

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1908.

No. 1914. **569**

GEORGE E. HOWARD, APPELLANT.

vs.

INTERNATIONAL TRUST COMPANY OF MARYLAND, A
CORPORATION.

AND

No. 1915.

GEORGE E. HOWARD, APPELLANT.

vs.

INTERNATIONAL TRUST COMPANY OF MARYLAND, A
CORPORATION.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JUNE 15, 1908.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA
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In the Court of Appeals of the District of Columbia

No. 1914.

GEORGE E. HOWARD, Appellant,

vs.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation,

and

No. 1915,

GEORGE E. HOWARD, Appellant,

v.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation.

a Supreme Court of the District of Columbia.

At Law. No. 49525.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation;
Plaintiff,

vs.

GEORGE E. HOWARD, Defendant,

and

At Law. No. 50111.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation,
Plaintiff,

vs.

GEORGE E. HOWARD, Defendant,

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled causes, to wit:

Declaration, Etc.

Filed June 10, 1907.

In the Supreme Court of the District of Columbia.

No. 49525. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation,
Plaintiff,

vs.

GEORGE E. HOWARD, Defendant,

The plaintiff, International Trust Company of Maryland, a corporation duly created and existing under and by virtue of a special Act of the Assembly of the State of Maryland, sues the defendant, George E. Howard, for money payable by the defendant to the plaintiff, for that the said defendant, heretofore, to wit, on the 5th of October, 1906, to wit, at the City of Washington, in the District of Columbia, executed and delivered to the National Vaccine & Formaldehyde Company, a corporation created and existing under the laws of the State of Virginia, a certain written contract or agreement, which was also executed by said National Vaccine & Formaldehyde Company, in and by which he, the said defendant, subscribed for five hundred (500) shares of the preferred capital stock of said National Vaccine & Formaldehyde Company, and then and there undertook and promised to pay for said stock the sum of ten (\$10) dollars for each and every share thereof subscribed for by him as aforesaid, in the manner hereinafter set forth, it being agreed and

2 understood by and between the said defendant and the said National Vaccine & Formaldehyde Company that no call should be made upon the said Howard until at least fifty thousand (\$50,000) dollars of said preferred stock should have been subscribed, and when said fifty thousand (\$50,000) dollars of said preferred stock should have been subscribed, he, the said defendant, promised to pay ten per cent. of the amount of his subscription price when the first call should be made therefor; fifteen per cent. three months after the said first call; twenty-five per cent. six months after the said first call; twenty-five per cent. nine months after the first call, and twenty-five per cent. twelve months after the first call. And the said defendant, to wit, at the time and place last aforesaid, in and by said paper writing agreed that the said National Vaccine & Formaldehyde Company, might assign the subscription of the said defendant to any individual or individuals, corporation or corporations from whom it might procure a loan to be secured by the said subscription and promise of the defendant and of other subscribers to said stock; and the defendant, to wit, at the time and place last aforesaid, in the manner aforesaid, further promised and agreed that all the rights and privileges granted by said subscription agreement to the said National Vaccine & Formaldehyde Company, should be

assignable to and might be exercised by such assignee. And the plaintiff further says that, to wit, between the 5th day of October, 1906, and the 10th day of October, 1906, there was subscribed a large amount of the preferred capital stock of said National Vaccine & Formaldehyde Company, to wit, sixty thousand (\$60,000) dollars of said stock at the value of ten (10) dollars per share, which
3 was an amount greater than the fifty thousand (\$50,000) dollars of said preferred stock upon which the subscription and promise of the said defendant was conditioned as aforesaid. And the plaintiff further says that, to wit, the 22nd day of October, 1906, at the City of Baltimore, in the State of Maryland, the said National Vaccine & Formaldehyde Company, delivered to the plaintiff a written assignment of the subscriptions to the preferred stock aforesaid, with the exception of ten per cent. of said subscriptions, which under the terms of the subscription agreement aforesaid were to be paid in on the first call, which written assignment had been theretofore to wit, on the 10th day of October, 1906, duly executed by the president of said Company, one R. K. Helphenstine, and the secretary of said company, one James F. Peyton; that said assignment was given to said plaintiff as collateral security upon certain promissory notes, and each of them, aggregating in value the sum of fifty thousand (\$50,000) dollars, which were executed by the National Vaccine & Formaldehyde Company and delivered to said plaintiff on, to wit, October 22, 1906, to wit, at the City of Baltimore, in the State of Maryland, and that in consideration of the said assignment and of the said promissory notes and of other good and valuable considerations, the said plaintiff did, to wit, during the fortnight commencing with the 22nd day of October, 1906, place to the credit of the said National Vaccine & Formaldehyde Company, in the banking department of the plaintiff, the sum of fifty thousand (\$50,000) dollars. And the plaintiff further says that one of said
4 promissory notes, which was for the sum of fifteen thousand (\$15,000) dollars, matured on the 30th day of April, 1907, and that no part of the sum represented thereby has been paid, with the exception of a small amount, to wit; the sum of \$200, and that with the exception aforesaid the full amount of fifteen thousand (\$15,000) dollars aforesaid is still due and unpaid. And the plaintiff further says that on, to wit, the 10th day of October, 1906, the said National Vaccine & Formaldehyde Company, made a call and demand upon the said defendant to pay the sum of five hundred (\$500) dollars, being ten per cent. of the amount of his subscription to said stock as aforesaid; and that on, to wit, the 10th day of January, 1907, said plaintiff made a call and demand upon the said defendant to pay on the 30th day of January, 1907, the sum of seven hundred and fifty (\$750) dollars, which was fifteen per cent. of the amount of his subscription to said stock as aforesaid; and that on, to wit, the 13th day of April, 1907, said plaintiff made a call and demand upon the said defendant to pay on the 30th day of April, 1907, the sum of twelve hundred and fifty (\$1250) dollars, which was twenty-five per cent. of the amount of his subscription to said stock as aforesaid. But the plaintiff says that the said defendant has

wholly neglected and still neglects to pay the amount called for, to wit, the two of said calls last aforesaid, and has not paid the said sum nor any part thereof, wherefore and whereby a cause of action has accrued in favor of the plaintiff to have, demand and receive from the said defendant the amount of the two calls last aforesaid, to wit: the sum of two thousand (\$2000) dollars with interest as follows: upon the sum of seven hundred and fifty (\$750) dollars from the 30th day of January, 1907, and upon twelve hundred and fifty (\$1250) dollars from the 30th day of April, 1907, besides costs.

WALTER C. CLEPHANE,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the Twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

WALTER C. CLEPHANE,
Attorney for Plaintiff.

STATE OF MARYLAND,
City of Baltimore, ss:

Personally appeared before me Samuel C. Rowland, who being first duly sworn, deposes and says:

I am the Vice-President of the International Trust Company of Maryland, which is named as plaintiff in the declaration hereto annexed, wherein George E. Howard is named as defendant, and I am the agent of said International Trust Company of Maryland for the purpose of making this affidavit, which I am authorized by it to make. Said International Trust Company of Maryland is a corporation duly created and existing under and by virtue of a special Act of the Assembly of the State of Maryland. The cause of action of the said International Trust Company of Maryland against the said George E. Howard is upon a certain agreement to subscribe for preferred stock in the National Vaccine & Formaldehyde Company, a corporation duly created and existing under and by virtue of the laws of the State of Virginia, which said subscription agreement has, with the consent of the said Howard, been assigned to the said Trust Company, which is now the owner of all rights thereunder, as will hereinafter more fully appear.

On or about the 5th day of October, 1906, the said Howard executed and delivered to the said National Vaccine & Formaldehyde Company, hereinafter styled the "Vaccine Company," a written contract which was also executed by said Vaccine Company, in and by which the said Howard subscribed for five hundred (500) shares of the preferred capital stock of said Vaccine Company, and in and by which he undertook to pay for said stock the sum of ten (\$10) dollars for each share thereof subscribed for by him as aforesaid. It was stipulated in said agreement that no calls should be made upon the said Howard for payments thereunder until at least fifty thousand (\$50,000) dollars of said preferred stock should have been subscribed, and when said fifty thousand (\$50,000) dollars of said

preferred stock should have been subscribed, the said Howard promised to pay ten per cent. of the amount of his subscription price when the first call should be made therefor; fifteen per cent. three months after the said first call; twenty-five per cent. six months after the said first call; twenty-five per cent. nine months after the said first call, and twenty-five per cent. twelve months after the said first call.

7 It was also stipulated in said contract by the parties thereto that the Vaccine Company might assign the said subscription to any person or corporation from whom it might procure a loan secured by the said subscription and promise of the defendant and of other subscribers to said stock; and that all the rights and privileges granted by said subscription agreement to the Vaccine Company should be assignable to and might be exercised by such assignee. Deponent further says that prior to the 10th day of October, 1906, as he is informed by the officers of said Vaccine Company, there was subscribed by various persons sixty thousand (\$60,000) dollars of said preferred stock at the value of ten (\$10) dollars per share. Deponent further says that on or about the 22nd day of October, 1906, the said Vaccine Company duly assigned to the said Trust Company the subscriptions to the preferred stock aforesaid, with the exception of ten per cent. of said subscriptions, which under the terms of said subscription agreement were to be paid in on the first call. That said assignment was given to said Trust Company as collateral security upon certain promissory notes, and each of them, aggregating in value the sum of fifty thousand (\$50,000) dollars, which it was agreed should be executed by the said Vaccine Company and delivered to the said Trust Company; that on or about the 22nd day of October, 1906, said notes were executed by said Vaccine Company and delivered to said Trust Company, and in consideration of said assignment and of the said promissory notes and other good and valuable considerations, the said Trust Company deposited in its banking department to the credit of said Vaccine

8 Company the sum of fifty thousand (\$50,000) dollars. Deponent further says that one of said promissory notes was for the sum of fifteen thousand (\$15,000) dollars, and by its terms was made payable on the 30th day of April, 1907, at the office of said Trust Company; that said note is still owned by said Trust Company and was presented at said office for payment at its maturity as aforesaid, but that no part of the sum represented thereby has been paid, with the exception of less than \$200, and that with the exception aforesaid the full amount of fifteen thousand (\$15,000) dollars aforesaid is still due and unpaid thereupon.

Deponent further says upon information derived from the officers of said Vaccine Company that on or about the 10th day of October, 1906, the Vaccine Company made a call and demand upon the said Howard to pay the sum of five hundred (\$500) dollars, being ten per cent. of the amount of his subscription to said stock as aforesaid; and upon his own personal knowledge deponent says that on or about the 10th day of January, 1907, said Trust Company made a call and demand upon the said Howard to pay on the 30th day of January, 1907; the sum of seven hundred and fifty (\$750) dollars, which was fifteen per cent. of the amount of his subscription to said

stock as aforesaid; and that on or about the 13th day of April, 1907, said Trust Company made a call and demand upon the said Howard to pay on the 30th day of April, 1907, the sum of twelve hundred and fifty (\$1250) dollars, which was twenty-five per cent. of the amount of his subscription to said stock as aforesaid; but the plaintiff says that no portion of the amounts called for under the second and third calls made as aforesaid has been paid or satisfied in any manner whatsoever, and that there is now due and owing to the said Trust Company by the said Howard, exclusive of all set-offs and just grounds of defense, the sum of Two thousand (\$2000) dollars, with interest as follows: upon the sum of seven hundred and fifty (\$750) dollars from the 30th day of January, 1907, and upon the sum of twelve hundred and fifty (\$1250) dollars from the 30th day of April, 1907, besides costs.

SAML. C. ROWLAND.

Subscribed and sworn to before me this 7th day of June, 1907.

[SEAL.]

HOWARD D. ADAMS,
Notary Public.

Plea.

Filed July 5, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49525.

INTERNATIONAL TRUST COMPANY OF MARYLAND

vs.

GEORGE E. HOWARD.

The defendant for plea to the declaration says that he does not owe the said sum of money demanded, or any part thereof, in manner and form alleged.

BRAINARD H. WARNER, JR.,
Attorney for Defendant.

10 DISTRICT OF COLUMBIA, ss:

Personally appeared before me George E. Howard, who, being duly sworn, deposes and says:

I am the George E. Howard named as defendant in the above entitled action. I deny the right of the plaintiff to recover from me the whole or any part of the sum claimed in the declaration.

I was induced to sign what purports to be the stock subscription agreement of the National Vaccine and Formaldehyde Company upon the representations of the promoters of the said company, hereinafter called the corporation, and through reliance upon the validity and good faith of the apparent subscriptions preceding my name upon the written agreement.

The prospectus issued by the said promoters regarding the National Vaccine and Antitoxin Establishment and the Kuhn Formaldehyde Generator Company, was false and misleading in its statements. It was held forth in said prospectus that the value of the entire business of the National Vaccine and Antitoxin Establishment was conservatively estimated at One Hundred Thousand (\$100,000) dollars when, as a matter of fact, known at the time to the said promoters, the value of the said entire business was very much less. It was held forth in said prospectus that all the patents, paraphernalia, et cetera, of the Kuhn Formaldehyde Generator Company, were, at a conservative estimate, valued at One Hundred Thousand (\$100,000) dollars, when, as a matter of fact, they were worth practically nothing. These properties were to be merged into the National Vaccine and Formaldehyde Company.

11 Besides relying upon the representations above set forth I was largely induced to sign the agreement by Charles E. Wood and Charles M. Campbell, each of whom had, apparently, subscribed for Fifteen Thousand (\$15,000) dollars of the preferred stock and upon whose good faith therein I depended. Subsequently I learned that the subscription of the said Wood and Campbell were not *bona fide* but were based upon an agreement between them and the corporation the execution of which was a condition precedent of such subscriptions, which was, in fact, reduced to writing to wit on the 25th day of October, A. D. 1903, whereby it was agreed that in consideration of such subscriptions, the corporation should pay to the said Wood and Campbell the sum of ten (10%) per centum of the gross proceeds of any loan to the corporation from a Trust Company so far as secured by the subscriptions of the said Wood and Campbell; that if called upon to pay any sum whatever on account of said loan or subjected to any expense whatever expressly including cost of counsel fees and litigation, said Wood and Campbell would be reimbursed by the corporation; that the corporation would execute a mortgage upon the real estate in Prince George County, Maryland, to be acquired from the National Vaccine and Antitoxin Establishment, to secure to the said Wood and Campbell, to wit, the sum of Thirty-three Thousand (\$33,000) dollars, and to secure the performance of said agreement; and in pursuance of said agreement the corporation paid to said Wood and Campbell a large sum of money and executed to them a mortgage upon its real estate in Prince George County, Maryland.

12 Further, the name of J. Augustus Flynn appeared upon the subscription agreement as a subscriber and upon its validity I relied. I later learned that said Flynn denied that he had ever signed the subscription.

Upon acquiring knowledge of the misrepresentations that had been made to me and of the frauds which had been perpetrated, I considered myself no longer bound by any contract of subscription to the corporation and so informed it; again I notified the International Trust Company of Maryland, the plaintiff herein, which, I understood, had entered into financial transactions with the corporation, that I disclaimed all connection with said corporation. This

notification was by letter, signed by my attorney, under date of January 7th, A. D. 1907.

And as a further reason I deny the right of the plaintiff to recover the whole or any part of the sum claimed because no first call for a payment of ten (10%) per centum of the amount of the preferred stock subscriptions in accordance with the stock subscription agreement alleged by plaintiff has ever been made, and under the terms of said agreement as alleged by plaintiff, no other money can be due until such first call has been made.

GEO. E. HOWARD.

Subscribed and sworn to before me this 3rd day of July A. D. 1907.

[SEAL.]

BENJ. F. EDWARDS,
Notary Public, D. C.

13

Replication.

Filed July 16, 1907.

In the Supreme Court of the District of Columbia.

No. 49525. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, Plaintiff,

vs.

GEORGE E. HOWARD, Defendant.

The plaintiff joins issue upon the defendant's plea.

WALTER C. CLEPHANE,
A. D. C.,
Attorney for Plaintiff.

Take notice that the issue joined in this cause will be tried at the next term of this court.

WALTER C. CLEPHANE,
A. D. C.,
Attorney for Plaintiff.

To Mr. Brainard H. Warner, Jr., Attorney for Defendant.

Memorandum.

April 1, 1908.—Verdict for Plaintiff for \$2,000. with interest on \$750. from January 30, 1907, and on \$1,250. from April 30, 1907.

14 Supreme Court of the District of Columbia.

TUESDAY, *April 7th*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * *

No. 49525. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation,
Plaintiff,

vs.

GEORGE E. HOWARD, Defendant.

It appearing that under the Rule of Court, judgment on verdict should be entered herein, it is so ordered: thereupon, it is considered and adjudged that the plaintiff herein recover of defendant herein the sum of Two Thousand Dollars (\$2000.00) with interest on Seven Hundred and Fifty Dollars (\$750.00) thereof from January 30th, 1907, and on Twelve Hundred and Fifty Dollars (\$1250.00) thereof from April 30th, 1907, being the money as aforesaid found due from said defendant to said plaintiff by reason of the premises, together with costs of suit to be taxed by the clerk and have execution thereof.

15 *Order for Appeal.*

Filed April 7, 1908.

In the Supreme Court of the District of Columbia, the 7th Day of April, 1908.

At Law. No. 49525.

INTERNATIONAL TRUST COMPANY

vs.

GEORGE E. HOWARD.

The Clerk of said Court will enter an appeal to the Clerk of the Court of Appeals and issue a citation to the appellee.

B. H. WARNER, JR.,
Attorney for Geo. E. Howard.

16 In the Supreme Court of the District of Columbia.

At Law. No. 49525.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corp.,

vs.

GEORGE E. HOWARD.

The President of the United States to International Trust Company of Maryland, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the

cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal filed in the Supreme Court of the District of Columbia, on the 7th day of April, 1908, wherein George E. Howard, is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this Seventh day of April in the year of our Lord one thousand nine hundred and eight.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF G. BUHRMAN,
Ass't Clerk.

Service of the above Citation accepted this 8th day of April, 1908, without waiving the right of appellee to insist upon the right to object to the settling of the bill of exceptions in this case, this objection being based upon the expiration of the trial term without the extension thereof.

WALTER C. CLEPHANE,
Attorney for Appellee.

[Endorsed:] 7. No. 49525. Law. Equity. Citation.

17

Memorandum.

April 9, 1908.—Appeal bond filed.

Supreme Court of the District of Columbia.

THURSDAY, *May 21st*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * *

Nos. 49525 and 50111. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, Plaintiff,
vs.

GEORGE E. HOWARD, Def't.

Comes now the defendant herein by his attorneys, and submits to the Court the Bill of Exceptions taken at the trial of these causes and prays that the same be signed, *nunc pro tunc*.

FRIDAY, *May 22nd*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

No. 49525 and 50111. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, Plaintiff,

vs.

GEORGE E. HOWARD, Def't.

18 The Court having this day signed the Bill of Exceptions in the above causes, now orders the same of record *nunc pro tunc*—the time of the noting thereof at the trial.

Directions to Clerk for Preparation of Transcript of Record.

Filed May 23, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49525.

INTERNATIONAL TRUST COMPANY OF MARYLAND

vs.

GEORGE E. HOWARD.

John R. Young, Esq., clerk:

Please include in the Transcript of Record for the Court of Appeals in the above entitled cause, the following pleadings:

1. Plaintiff's declaration, etc.
2. Pleas and affidavits of defendant.
3. Plaintiff's joinder of issue.
4. Memorandum of verdict for plaintiff.
5. Judgment.
6. Appeal order.
7. Citation.
8. Memorandum of appeal bond.
9. Bill of exceptions and order thereon.

B. H. WARNER, JR.,
Attorney for Defendant.

19

Declaration.

Filed January 6, 1908.

In the Supreme Court of the District of Columbia.

No. 50111. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation,
Plaintiff,

vs.

GEORGE E. HOWARD, Defendant.

The Plaintiff, International Trust Company of Maryland, a corporation duly created and existing under and by virtue of a special

act of the Assembly of the State of Maryland, sues the defendant, George E. Howard, for money payable by the defendant to the plaintiff, for that the said defendant, heretofore, to wit on the 5th day of October, 1906, to wit, at the City of Washington, in the District of Columbia, executed and delivered to the National Vaccine and Formaldehyde Company, a corporation created and existing under the laws of the State of Virginia, a certain written contract or agreement, which was also executed by said National Vaccine and Formaldehyde Company, in and by which he, the said defendant, subscribed for five hundred (500) shares of the preferred capital stock of said National Vaccine and Formaldehyde Company, and then and there undertook and promised to pay for said stock the sum of ten (\$10) dollars for each and every share thereof subscribed for by him as aforesaid, in the manner hereinafter set forth, it being therein

20 agreed and understood by and between the said defendant and the said National Vaccine and Formaldehyde Company

that no call should be made upon the said Howard until at least fifty thousand (\$50,000) dollars of said preferred stock should have been subscribed, and when said fifty thousand (\$50,000) dollars of said preferred stock should have been subscribed, he, the said defendant, therein promised to pay ten per cent. of the amount of his subscription price when the first call should be made therefor; fifteen per cent. three months after the said first call; twenty-five per cent. six months after the said first call; twenty-five per cent. nine months after the said first call, and twenty-five per cent. twelve months after the said first call; and the said defendant, to wit, at the time and place last aforesaid, in and by said paper writing agreed that the said National Vaccine and Formaldehyde Company, might assign the subscription of the said defendant to any individual or individuals, corporation or corporations from whom it might procure a loan to be secured by the said subscription and promise of the defendant and of other subscribers to said stock; and the defendant, to wit, at the time and place last aforesaid, in the manner aforesaid, further promised and agreed that all the rights and privileges granted by said subscription agreement to the said National Vaccine and Formaldehyde Company, should be assignable to and might be exercised by such assignee. And the plaintiff further says, that, to wit, between the 5th day of October, 1906, and the 10th day of October, 1906, there was subscribed a large amount of the preferred capital stock of said National Vaccine and Formaldehyde Company,

21 to wit, sixty thousand (\$60,000) dollars of said stock, at the value of ten (\$10) dollars per share, which was an amount greater than the fifty thousand (\$50,000) dollars of said preferred stock upon which the subscription and promise of the said defendant was conditioned as aforesaid. And the plaintiff further says that, to wit, the 22d day of October, 1906, at the City of Baltimore, in the State of Maryland, the said National Vaccine and Formaldehyde Company, delivered to the plaintiff written assignments of the subscriptions to the preferred stock aforesaid including the subscription of the defendant as aforesaid, with the exception of ten per cent. of said subscriptions which under the terms of the sub-

scription agreement aforesaid were to be paid in on the first call, which written assignments had been theretofore to wit, on the 10th day of October, 1906 duly executed under the corporate seal of said National Vaccine and Formaldehyde Company, by the president of said company, one R. K. Helphenstine, and the secretary of said company, one James F. Peyton; that said assignments were given to said plaintiff as collateral security upon certain promissory notes, and each of them, aggregating in value the sum of fifty thousand (\$50,000) dollars, which were executed by the National Vaccine and Formaldehyde Company and delivered to said plaintiff on, to wit, October 22, 1906, to wit, at the City of Baltimore, in the State of Maryland, and that in consideration of the said assignments and of the said promissory notes and of other good and valuable considerations, the said plaintiff did, to wit, during the latter part of October, 1906, place to the credit of the said National Vaccine and

22 Formaldehyde Company, in the banking department of the plaintiff, the sum of fifty thousand (\$50,000) dollars, which was subsequently, to wit: within 30 days thereafter checked out by said Nat. Vaccine & Formaldehyde Company. And the plaintiff further says that said promissory notes have since all matured and are unpaid with the exception of one of said notes which was for the sum of nine thousand (\$9,000) dollars, and that no part of the said fifty thousand (\$50,000) dollars as aforesaid has been repaid by said company or any of said subscribers to said stock with the exception of a much smaller sum of money, to wit, the sum of sixteen thousand (\$16,000) dollars. And the plaintiff further says that on, to wit, the 27th day of October, 1906, the said National Vaccine and Formaldehyde Company, made a call and demand upon the said defendant to pay the sum of five hundred (\$500) dollars, being ten per cent. of the amount of his subscription to said stock as aforesaid; and that on, to wit, the 10th day of January, 1907, said plaintiff made a call and demand upon the said defendant to pay on the 30th day of January 1907, the sum of seven hundred and fifty (\$750) dollars, which was fifteen per cent. of the amount of his subscription to said stock as aforesaid; and that on, to wit, the 13th day of April, 1907, said plaintiff made a call and demand upon the said defendant to pay on the 30th day of April, 1907, the sum of twelve hundred and fifty (\$1250) dollars, which was twenty-five per cent. of the amount of his subscription to said stock as aforesaid. And that on, to wit, the fifteenth day of July, 1907, the said plaintiff made a call and demand on said defendant to pay on the 30th

23 day of July, 1907 the sum of twelve hundred and fifty (\$1250) dollars, which was twenty-five per cent. of the amount of his subscription to said stock as aforesaid; and that on, to wit, the fifteenth day of October, 1907, said plaintiff made a call and demand upon said defendant to pay on the 30th day of October, 1907, the sum of twelve hundred and fifty (\$1250) dollars, which was twenty-five per cent. of the amount of his subscription to said stock as aforesaid. But the plaintiff says that the said defendant has wholly neglected and still neglects to pay the amount called for, to wit, the two of said calls last aforesaid, and has

not paid the said sum nor any part thereof; wherefore and whereby a cause of action has accrued in favor of the plaintiff to have, demand and receive from the said defendant the sum of the two calls last aforesaid, to wit, the sum of two thousand five hundred (\$2500) dollars with interest as follows, upon the sum of twelve hundred and fifty (\$1250) dollars from the 30th day of July, 1907, and upon twelve hundred and fifty (\$1250) dollars from the 30th day of October, 1907, besides costs.

WALTER C. CLEPHANE,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the Twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

WALTER C. CLEPHANE,
Attorney for Plaintiff.

24

Amended Declaration.

Filed February 7, 1908.

In the Supreme Court of the District of Columbia.

No. 50111. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation,
Plaintiff,

vs.

GEORGE E. HOWARD, Defendant.

Comes now the plaintiff and with leave of the court first had and obtained, amends its declaration by substituting the following:

The Plaintiff, International Trust Company of Maryland, a corporation duly created and existing under and by virtue of a special Act of the Assembly of the State of Maryland, sues the defendant, George E. Howard, for money payable by the defendant to the plaintiff, for that the said defendant, heretofore, to wit, on the 5th day of October, 1906, to wit, at the City of Washington, in the District of Columbia, executed and delivered to the National Vaccine and Formaldehyde Company, a corporation created and existing under the laws of the State of Virginia, a certain written contract or agreement, which was also executed by said National Vaccine and Formaldehyde Company, in and by which he, the said defendant, subscribed for five hundred (500) shares of the preferred capital stock of said National Vaccine and Formaldehyde Company, and

25 then and there undertook and promised to pay for said stock the sum of ten (\$10) dollars for each and every share thereof subscribed for by him as aforesaid, in the manner hereinafter set forth, it being therein agreed and understood by and between the said defendant and the said National Vaccine and Formaldehyde Company that no call should be made upon the said Howard until

at least fifty thousand (\$50,000) dollars of said preferred stock should have been subscribed, and when said fifty thousand (\$50,000) dollars of said preferred stock should have been subscribed, he, the said defendant, therein promised to pay ten per cent. of the amount of his subscription price when the first call should be made therefor; fifteen per cent. three months after the said first call; twenty-five per cent. six months after the said first call; twenty-five per cent. nine months after the said first call, and twenty-five per cent. twelve months after the said first call; and the said defendant, to wit, at the time and place last aforesaid, in and by said paper writing agreed that the said National Vaccine and Formaldehyde Company, might assign the subscription of the said defendant to any individual or individuals, corporation or corporations from whom it might procure a loan to be secured by the said subscription and promise of the defendant and of other subscribers to said stock; and the defendant, to wit, at the time and place last aforesaid, in the manner aforesaid, further promised and agreed that all the rights and privileges granted by said subscription agreement to the said National Vaccine and Formaldehyde Company, should be assignable to and might be exercised by such assignee. And the plaintiff further says that on, to wit, between

26 the 20th day of September, 1905, and the 10th day of October, 1906, there was subscribed a large amount of the preferred capital stock of said National Vaccine and Formaldehyde Company, to wit, sixty thousand (\$60,000) dollars of said stock, at the value of ten (\$10) dollars per share, which was an amount greater than the fifty thousand (\$50,000) dollars of said preferred stock upon which the subscription and promise of the said defendant was conditioned as aforesaid. And the plaintiff further says that, to wit, the 22d day of October, 1906, at the City of Baltimore, in the State of Maryland, the said National Vaccine and Formaldehyde Company, delivered to the plaintiff written assignments of the subscriptions to the preferred stock aforesaid including the subscription of the defendant as aforesaid, with the exception of ten per cent. of said subscriptions which under the terms of the subscription agreement aforesaid were to be paid in on the first call, which written assignments had been theretofore to wit, on the 10th day of October, 1906, duly executed under the corporate seal of said National Vaccine and Formaldehyde Company, by the president of said company, one R. K. Helphenstine, and the secretary of said company, one James F. Peyton; that said assignments were given to said plaintiff as collateral security upon certain promissory notes, and each of them, aggregating in value the sum of fifty thousand (\$50,000) dollars, which were executed by the National Vaccine and Formaldehyde Company and delivered to said plaintiff on, to wit, October 22, 1906, to wit, at the City of Baltimore, in the State of Maryland, and that in consideration of the said assignments and of

27 the said promissory notes and of other good and valuable consideration, the plaintiff then and there agreed to loan to said National Vaccine and Formaldehyde Company a large sum of money, to wit, the sum of fifty thousand (\$50,000) dollars, but not until after the call for the first payment of the amount due

under said subscription agreement, to wit, ten per cent. thereof, should have been made by said National Vaccine and Formaldehyde Company; and said plaintiff did, to wit, at the time and place last aforesaid, upon consideration of the promise and agreement of said National Vaccine and Formaldehyde Company that said call should be at once made and paid, advance and pay over to the order of the said National Vaccine and Formaldehyde Company a portion of said sum of fifty thousand (\$50,000) dollars to wit, twenty-two thousand (\$22,000) dollars; and the plaintiff further says that on, to wit; the 27th day of October, 1903, the said National Vaccine and Formaldehyde Company made a call and demand upon the said defendant to pay the sum of five hundred (\$500) dollars which was ten per cent. of the amount of his subscription to said stock as aforesaid; and that said plaintiff did, to wit, within a fortnight thereafter, pay over to the order of the National Vaccine and Formaldehyde Company the balance of said fifty thousand (\$50,000) dollars, to wit, the sum of twenty-eight thousand (\$28,000) dollars. And the plaintiff further says that said promissory notes have since all matured and are unpaid, with the exception of one of said notes which was for the sum of nine thousand (\$9,000) dollars, and that no part of the said fifty thousand (\$50,000) dollars as aforesaid has been repaid with the exception of a much smaller sum of money, to wit,

the sum of sixteen thousand (\$16,000) dollars. And the
28 plaintiff further says that on, to wit, the 10th day of January, 1907, said plaintiff made a call and demand upon the said defendant to pay on the 30th day of January, 1907, the sum of seven hundred and fifty (\$750) dollars, which was fifteen per cent. of the amount of his subscription to said stock as aforesaid; and that on, to wit, the 13th day of April, 1907, said plaintiff made a call and demand upon the said defendant to pay on the 30th day of April, 1907, the sum of twelve hundred and fifty (\$1250) dollars, which was twenty-five per cent. of the amount of his subscription to said stock as aforesaid; and that on, to wit, the fifteenth day of July, 1907, the said plaintiff made a call and demand on said defendant to pay on the 30th day of July 1907, the sum of twelve hundred and fifty (\$1250) dollars, which was twenty-five per cent. of the amount of his subscription to said stock as aforesaid; and that on, to wit, the fifteenth day of October, 1907, said plaintiff made a call and demand upon said defendant to pay on the 30th day of October, 1907, the sum of twelve hundred and fifty (\$1250) dollars, which was twenty-five per cent. of the amount of his subscription to said stock as aforesaid. But the plaintiff says that the said defendant has wholly neglected and still neglects to pay of the amount called for as aforesaid, to wit, the amount of the two of said calls last aforesaid, and has not paid the said sum nor any part thereof; wherefore and whereby a cause of action has accrued in favor of the plaintiff to have, demand and receive from the said defendant the amount of the two calls last afore-

said, to wit, the sum of two thousand five hundred (\$2500)
29 dollars with interest as follows, upon the sum of twelve hundred and fifty (\$1250) dollars from the 30th day of July,

1907, and upon twelve hundred and fifty (\$1250) dollars from the 30th day of October, 1907, besides costs.

WALTER C. CLEPHANE,
Attorney for Plaintiff.

Plea.

Filed March 9, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50111.

INTERNATIONAL TRUST COMPANY OF MARYLAND
vs.
GEORGE E. HOWARD.

The defendant for plea to the declaration says that he does not owe the said sum of money demanded, or any part thereof, in manner and form alleged.

B. H. WARNER, JR.,
Attorney for Defendant.

Replication.

Filed March 10, 1908.

In the Supreme Court of the District of Columbia.

No. 50111. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND
vs.
GEORGE E. HOWARD.

The plaintiff joins issue with the defendant.

WALTER C. CLEPHANE,
Attorney for Plaintiff.

30 Take notice that the issues joined in the above entitled cause have been set for trial in Circuit Court No. 2 on Monday, the 16th day of March, 1908, at the hour of 10 o'clock A. M., or as soon thereafter as said case shall be reached; and that unless said issues shall be tried at the January term of this Court they will be tried at the next term thereof.

WALTER C. CLEPHANE,
Attorney for Plaintiff.

To Brainard H. Warner, Jr., Esq., Attorney for Defendant.

Memorandum.

April 1, 1908.—Verdict for Plaintiff for \$2,500.00, with interest on \$1,250.00 from July 30, 1907, and on \$1,250.00 from October 30, 1907.

31 Supreme Court of the District of Columbia.

TUESDAY, *April 7th*, 1908.

Session resumes pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * *

No. 50111. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, a Corporation,
Plaintiff,

vs.

GEORGE E. HOWARD, Defendant.

It appearing that under the Rule of Court, judgment on verdict should be entered herein, it is so ordered; thereupon, it is considered and adjudged, that the plaintiff herein recover of defendant herein, the sum of Two Thousand Five Hundred Dollars, with interest on Twelve Hundred and Fifty Dollars (\$1250.00) thereof from July 30th, 1907, and on Twelve Hundred and Fifty Dollars (\$1250.00) thereof, from October 30th, 1907, together with costs of suit to be taxed by the Clerk, and have execution thereof.

32 *Order for Appeal.*

Filed April 7, 1908.

In the Supreme Court of the District of Columbia, the 7th Day of April, 1908.

At Law. No. 50111.

INTERNATIONAL TRUST COMPANY

vs.

GEORGE E. HOWARD.

The Clerk of said Court will enter an appeal to the Clerk of the Court of Appeals and issue a citation to the appellee.

B. H. WARNER, JR.,
Attorney for Geo. E. Howard.

33 In the Supreme Court of the District of Columbia.

At Law. No. 50111.

INTERNATIONAL TRUST COMPANY OF MARYLAND

vs.

GEORGE E. HOWARD.

The President of the United States to International Trust Company of Maryland, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause

therein, under and as directed by the Rules of said Court, pursuant to an appeal filed in the Supreme Court of the District of Columbia, on the 7th day of April, 1908, wherein George E. Howard, is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 7th day of April in the year of our Lord one thousand nine hundred and eight.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF G. BUHRMAN,
Ass't Clk.

Service of the above Citation accepted this 8th day of April, 1908, without waiving the right of appellee to insist upon the right to object to the settling of the bill of exceptions in this case, this objection being based upon the expiration of the trial term without the expression thereof.

WALTER C. CLEPHANE,
Attorney for Appellee.

[Endorsed:] 17. No. 50111. Law. Equity. Citation.

34

Memorandum.

April 9, 1908.—Appeal Bond Filed.

Supreme Court of the District of Columbia.

THURSDAY, *May 21st*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * *

Nos. 49525 and 50111. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, Plaintiff,

vs.

GEORGE E. HOWARD, Def't.

Comes now the defendant herein by his attorneys, and submits to the Court the Bill of Exceptions taken at the trial of these causes and prays that the same be signed, *nunc pro tunc*.

FRIDAY, *May 22nd*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

Nos. 49525 and 50111. At Law.

INTERNATIONAL TRUST COMPANY OF MARYLAND, Plaintiff,

vs.

GEORGE E. HOWARD, Def't.

35 The Court having this day signed the Bill of Exceptions in the above causes, now orders the same of record *nunc pro tunc*—the time of the noting thereof at the trial.

Bill of Exceptions.

Filed May 25, 1908.

In the Supreme Court of the District of Columbia.

At Law. Nos. 49525 & 50111.

INTERNATIONAL TRUST COMPANY OF MARYLAND

vs.

GEORGE E. HOWARD.

Be it remembered, that on the twenty-fourth (24th) day of March, A. D. 1908, before the Honorable Thomas H. Anderson, Associate Justice of said Court, and a jury regularly impanelled, the above entitled causes came on to be heard at 10:20 o'clock, A. M., upon issues joined. And the plaintiff to maintain the issues on its part submitted the following evidence:

BENJAMIN E. TAYLOR, being first duly sworn, testified that in October, 1906, he was engaged in the promotion of the National Vaccine & Formaldehyde Company, that he had seen two documents, marked for identification "O. B. B. No. 1" and "Plaintiff's Exhibit No. 1," handed to him by counsel, which are the subscription agreements upon which suit is brought, and that he had secured the signatures of several parties, including the defendant, to the document marked for identification "O. B. B. No. 1." Coun-
36 sel handed witness what purported to be the minute book of the Vaccine Company, marked for identification "R. K. H. No. 1, J. Arthur Lynham, Examiner," and asked whether the signatures therein of James F. Peyton, R. K. Helphenstine and Charles M. Campbell were genuine, whereupon defendant admitted said signatures to be genuine, it being further admitted by defendant that the initials "J. E. P." appearing on the margins of said book were the genuine signatures of James F. Peyton. Defendant admitted his signatures to a proxy appearing in said book. Witness further testified that he secured said proxy on October 23rd, 1906, and turned same over to C. C. Carlin. Said Proxy was offered in evidence, and is in the words and figures following:

I do hereby constitute Ben. E. Taylor my true and lawful proxy to represent me and vote my stock for and in my stead and place at

all meetings of the stockholder of the National Vaccine and Formaldehyde Company, as though I was present, until revoked by me.

(Signed)

GEORGE E. HOWARD.

MAUDE C. MANNING, *Witness*.

RUFUS K. HELPHENSTINE, being first duly sworn, testified that certain proxies of stockholders of the National Vaccine & Formaldehyde Company, held by witness, were voted at a meeting of stockholders of said company October 27th, 1906, that he did not recall whether the proxies held by Benjamin E. Taylor were voted at that meeting, that there was not a dissenting vote and that said
37 Taylor was present. Witness was handed a book by counsel, which witness identified as the minute book of the National Vaccine & Formaldehyde Company. Witness further testified that the minutes were kept in his custody part of the time, and most of the time at the office of the late C. E. Wood.

"Q. Do you know who wrote those minutes up? A. Mr. Peyton was secretary at that time.

"Q. And you appear to have signed those minutes? A. Yes sir

"Q. When you signed them, did you read them over and ascertain if they were correct? A. I read them over and they were correct and they are recorded in there."

Witness further testified that the minutes were substantially correct, barring some little inaccuracies that occurred, that, for instance, some meetings were dated in Alexandria, though, as a matter of fact, they were held in Washington, that this was done in accordance with instructions of the company's attorney, and that no objection was made thereto; that independently of the minutes, witness could not recall all the various things that happened at the meetings of the company; that there was a meeting held on October 25th, 1906, after witness, C. C. Carlin, Benjamin E. Taylor, O. B. Blackburn and J. F. Peyton had gone to Baltimore to negotiate a loan of \$50,000 from plaintiff; witness identified certain promissory notes, for \$11,000, \$15,000 and \$15,000 respectively, dated October 22nd, bearing witness' signature, and that of James F. Peyton, Secretary, and the seal of the National Vaccine & Formaldehyde Company; that he could not recall any further notes; that said notes were delivered to plaintiff; witness identified a paper bearing his signature, the
38 signature of James F. Peyton, the Secretary, and the Corporate seal of the National Vaccine & Formaldehyde Company, and further testified that the paper was delivered to plaintiff at the time the notes were delivered to plaintiff, and which is the copy of a resolution of the Vaccine Company hereinafter inserted.

"Q. State the negotiations if any, which occurred at that time, between the officers of the Vaccine Company and the Trust Company with regard to the advancing of any money to the Vaccine Company? A. I would like to state that Mr. Carlin, our attorney, did all the talking on that occasion, and had full charge of that particular branch of it. True, I was there and signed the notes for the money, and we entered into an agreement as shown here, for the money,

but Mr. Carlin was there and had full and entire charge of that part of it."

Witness further testified that a report of the negotiations was made to a meeting of the stockholders of the Vaccine Company.

"Q. What did you say at that time? A. That was also said by Mr. Carlin.

"Q. Yes. A. I reported what had occurred there, that we had succeeded in negotiating the loan, and so forth, and so forth."

Witness further testified that Benjamin E. Taylor was present holding proxies; that without refreshing his memory from the minutes he could not recall what had occurred at the meeting. Witness studied the minutes.

By the COURT:

"Q. Can you state in substance what occurred? A. I can't do it; I can't remember anything that occurred at that meeting."

Witness further testified that he could not remember what occurred at the stockholders meeting of October 27th, 1906, without
39 the minute book, but that he did recollect that these minutes were read at the meeting and were acceptable to all present including Taylor, who held defendant's proxy; that the minutes were kept because their memories might not serve them. Plaintiff thereupon offered in evidence the minutes of the stockholders' meetings of the Vaccine Company of October 25th and 27th, 1906. To which defendant objected, on the ground that said minutes had not been properly proved as an accurate record of the meetings in question, that witness had not recorded same, and that same were improper evidence as against the defendant, for any purpose in the issues herein joined. Which objection was overruled by the Court, and defendant was allowed an exception.

The minutes, which were later read to the jury by plaintiff, were as follows:

"ALEXANDRIA, VA., Oct. 25th, 1906.

"At a meeting of the incorporators and stockholders of the National Vaccine and Formaldehyde Company, held this day (October 25, 1906) at the office of C. C. Carlin, 107 North Fairfax Street, Alexandria, Virginia, there were present in person R. K. Helphenstine, President, James F. Peyton, Secretary and Treasurer, O. B. Blackburn, B. E. Taylor, Charles M. Campbell, C. E. Wood, C. C. Carlin and Louis C. Barley, and the following proxies were presented: L. C. Thorn, Wm. F. Spencer, Geo. E. Howard, F. A. St. Clair, Joseph Schiffman, constituting Ben. E. Taylor their true and lawful attorney and proxy to vote their stock for and in their
40 stead and place; John J. Riordan, Jr., Harrison Crook, and Henry M. Baker, constituting R. K. Helphenstine their true and lawful proxy to vote their stock for and in their stead, and this being all of the stockholders of the Company who are entitled to vote, upon motion of Ben. E. Taylor all formal notice of every sort and kind was expressly waived.

"The minutes of all former meetings of incorporators, directors and officers were read and upon motion of O. B. Blackburn their

action in all matters was adopted as the action of the stockholders themselves, and the same was in every way ratified and approved by the unanimous vote of all the stock represented in person and by proxy.

"President R. K. Helphenstine stated that it would be necessary under our agreement with the International Trust Company of Maryland for the officers of this company to make the first call of 10 per cent. under the subscription contract upon the subscribers, and upon motion of O. B. Blackburn the President and Treasurer were directed to immediately make said call and to cover the money into the Treasury of the company. After the first call the President and Treasurer of the Company are directed to pay all future calls upon the subscription contract which may be made by the International Trust Company of Maryland out of any profits or earnings of the Company which may have been paid them from any and all sources. The President, Mr. R. K. Helphenstine, informed the

41 meeting that he had assigned the subscription contracts to the International Trust Company of Maryland, together with the preferred and common stock of the subscribers thereto as collateral security for the payment of the loan of \$50,000.00, and that \$20,000.00 worth of the common stock of the Company, fully paid and non-assessible, is to be issued to the International Trust Company of Maryland as a commission for said loan, and \$5,000.00 of the common stock of the Company to John J. Riordan, Jr., broker, as a commission for negotiating said loan. Upon motion of O. B. Blackburn this action was ratified, approved and affirmed, and the President and Secretary were directed to issue the common stock of the Company in accordance with the aforesaid understanding.

"The notes of the Company aggregating the sum of \$50,000.00 were executed by the President and Secretary, payable to the International Trust Company of Maryland as follows: (Here insert description of notes.)

"Upon motion of Ben. E. Taylor, the President and Treasurer were authorized to draw the check of the Company for all expenses which have been incurred in the organization of the Company.

"Upon motion of O. B. Blackburn Messrs. C. M. Campbell and C. E. Wood were appointed a committee to see to the execution of the deed from the National Vaccine and Antitoxin Establishment to this Company.

"The meeting thereupon adjourned until Saturday afternoon, October 27th, 1906, at 2.00 P. M., at the office of C. C. Carlin Alexandria, Va.

"R. K. HELPHENSTINE,
President.

JAMES F. PEYTON, *Secretary.*

42 *Minutes of the Meeting of October 27th, 1906.*

"ALEXANDRIA, VA., October 27, 1906.

Pursuant to adjournment, the stockholders, officers and incorporators of the National Vaccine and Formaldehyde Company met this

date at the office of C. C. Carlin, in the City of Alexandria, Va., all of the stock being represented in person or by proxy. There were present in person R. K. Helphenstine, President; James F. Peyton, Secretary and Treasurer; O. B. Blackburn, Ben. E. Taylor, Charles M. Campbell, C. E. Wood, C. C. Carlin, and Louis C. Barley, and the following proxies were presented: L. C. Thorn, William F. Spencer, George E. Howard, F. A. St. Clair and Joseph Shipman, constituting Ben. E. Taylor their true and lawful attorney and proxy to vote their stock for and in their stead and place; John J. Riordan, Jr., Harrison Crook, and Henry M. Baker, constituting R. K. Helphenstine their true and lawful attorney to vote their stock for and in their stead and place: and these being all the stockholders of the Company who are authorized to vote, upon motion of Ben. E. Taylor all formal notice of any sort and kind was expressly waived. The minutes of the previous meeting were read, ratified and approved, and the following resolution was offered by O. B. Blackburn, and unanimously adopted:

Resolved, That the President of this Company be and is hereby authorized, empowered and directed to execute by and on behalf
of the Company the following agreement, it being expressly
43 understood that only the Company's assets shall be bound
thereby, and that no personal liability whatever is created or
shall attach to the individual stockholders thereby.

This agreement, made this 25th day of October, 1906, between the National Vaccine and Formaldehyde Company, a body corporate under the laws of the State of Virginia, hereinafter designated as the Corporation, and Charles E. Wood, and Charles M. Campbell, hereinafter designated as the subscribers:

Witnesseth that the said parties have agreed together as follows:

Whereas the said corporation desires the said subscribers to subscribe to 1650 shares each of the preferred capital stock of said corporation upon the terms set forth in a certain contract of subscription between them and others, dated October 5th, 1906, and made part hereof, so far as applicable:

And whereas said corporation desires to pledge the subscriptions to said preferred stock including those of said subscribers to secure a loan about to be obtained from a trust company;

And whereas as a condition of such subscription and such use of said contract of subscription as such security, the said subscribers parties hereto have required the execution of this contract.

Now therefore it is mutually agreed between the parties hereto
respectively that in consideration of the subscription by said
44 subscribers as above set forth said corporation does agree with
them respectively and according to their respective interests
as follows:

That it will pay to each of said subscribers the sum of 10% of all the gross proceeds of said loan so far as based upon the subscription of said subscribers and will transfer and deliver to them common stock provided in said subscription agreement.

That the said corporation will promptly pay to said Trust Company the full amount of the principal and interest of the loan made by said Trust Company.

That if the said subscribers shall be called upon under the terms of their or either of their subscriptions to pay any sum whatever on account of said loan, by said Trust Company or shall be subject to any expense of *any expense* whatsoever expressly including expenses of litigation and counsel fees, the said corporation will forthwith upon demand of them or either of them pay to them or either of them, all such amounts as they or either of them may have been required to expend for any of the purposes aforesaid, with interest upon each of said payments at 6% per annum until the date of payment by said corporation.

That the said corporation will well and truly and completely save harmless and indemnify the said subscribers and each of them from and against all and any manner of loss, cost, damage and expense from and on account of their and each of their subscriptions as aforesaid, or in any wise resulting therefrom, whether to creditors,
45 minority stockholders, or otherwise, in whatsoever manner such liability may arise, including all expenses of litigation and counsel fees as above set forth.

That said corporation will execute a mortgage upon the real estate to be acquired by it from the National Vaccine and Antitoxin Establishment in Prince George's County, State of Maryland, securing the performance of this agreement.

That the said corporation will use due diligence in the collection of subscriptions to said stock and to the common stock of the Company and will use like diligence in the development and prosecution of the Company's business, and will employ all of the proceeds of stock subscriptions of every nature and all the revenue derived from the Company's business over and above what is actually necessary in good faith for the prosecution and development of said business in paying off the said loan and that the first payments on account thereof shall be paid on account of the said loan as far as secured by the subscriptions of the said subscribers parties hereto, until the loan in respect thereof shall have been fully paid before any other part of said loan shall be paid.

That in obtaining said loan due provision will be made for priority of security and payment in respect of the aforesaid stock owned by said subscribers.

That in obtaining subscriptions from others, in respect to said stock, and in obtaining said loan, such provision shall be made in the contract with respect thereto as will give full effect to this
46 agreement in all its parts.

That all such corporate action as counsel for said subscribers may require whether by stockholders or directors and the record thereof before its final transcription shall be submitted to the inspection and approval of said counsel.

That the Board of Directors of said corporation shall consist of seven members, four of whom shall be said Wood and Campbell, or persons nominated by them.

That the executive officers of the Company shall be the persons nominated by said Wood and Campbell.

That at least 51% of both the preferred and common stock of said corporation shall be transferred by the holder thereof under a voting

trust the terms of which shall be satisfactory to said Wood and Campbell.

NATIONAL VACCINE & FORMAL-
DEHYDE COMPANY,

(Signed) By R. K. HELPHENSTINE, *President*.

Attest:

(Signed) JAMES F. PEYTON, *Secretary*.

Approved for action and as the action of the Company, and without any personal liability to any person.

C. M. CAMPBELL.

THE KUHN FORMALDEHYDE
GENERATOR COMPANY,

(Sgd.) By JAMES F. PEYTON, *Sec'y*.

JAMES F. PEYTON.

R. K. HELPHENSTINE.

C. E. WOOD.

BEN. E. TAYLOR.

O. B. BLACKBURN.

C. C. CARLIN.

LOUIS C. BARLEY.

47 And to execute by and on behalf of the Company the following Mortgage: (Here insert the mortgage.)

The two foregoing papers were executed upon the request of Charles M. Campbell and Charles E. Wood, to secure them their subscription to the stock of this Company, they having demanded and required the same, and promised and agreed to extend their personal credit to the Company for the future purposes of the Company. Upon motion of O. B. Blackburn it was unanimously agreed that the officers of this company should consist of a President, and General Manager, a Vice-President, a Secretary and Treasurer, and a Manager of the Sales Department, who, together with three others, should constitute a Board of Directors of seven.

Upon motion of O. B. Blackburn it was further unanimously agreed that the preferred stock of the Company should participate in the first dividends to the extent of 6%, which dividend should be non-cumulative. Upon motion of O. B. Blackburn, the following resolution was unanimously passed:

Resolved, that it is the sense of the stockholders that the name of the Company shall be changed to be "National Vaccine Pharmacal Company," and that the President and Secretary be and are hereby authorized to file a petition with the Corporation Commission of the State of Virginia requesting such change, and to execute all papers necessary to make the same effective.

48 Upon motion of O. B. Blackburn it was unanimously decided to proceed to the election of new officers for the Company, all of the old officers having tendered their resignations, the same having been accepted to take effect upon the election of their successors. An election was then held, and by unanimous vote of all the stockholders the following officers were elected:

Charles M. Campbell, President and general manager, Ralph Walsh, Vice President, R. K. Helphenstine, Secretary and Treasurer, Ben. E. Taylor, Manager of the Sales Department, who together with C. E. Wood, O. B. Blackburn, and Walter Hough, were elected Directors, and to constitute the officers and directors of this Company until the next annual meeting of the stockholders. C. C. Carlin was appointed a committee of one to draft suitable by-laws for the government of the Company, and to submit the same to the Board of Directors, which, when adopted by them, shall be the by-laws for the government of the Company until changed by a majority vote of the stockholders of the Company.

It was further resolved that the law officers of the Company shall be under the direction of the President, except that after this date all checks upon the account of the Company shall be drawn and signed by Charles M. Campbell, President, and R. K. Helphenstine, Treasurer.

It was further unanimously resolved that the check of this Company for \$350.00 be given to C. C. Carlin for professional services rendered.

It was further unanimously agreed to issue one share of common stock to Walter Hough; 400 shares of common stock to H. M. Baker, and one hundred shares of common stock to Harrison Crook, for services rendered, said shares to be fully paid up and non-assessable. Upon motion of O. B. Blackburn the salary of the President was fixed at \$1200.00 per annum, and the President was authorized to employ such other persons as may be necessary for the operation and management of the Company, and to fix their salaries and pay the same out of the treasury of the Company.

It being stated to the meeting that the Kuhn Formaldehyde Generator Company had agreed to accept its cash payment due under its contract as follows: Seven Thousand (\$7,000.) dollars in cash, and two notes of the Company for Four thousand \$4,000. Dollars each, dated October 29th, 1906, and payable twelve (12) months after date, to the order of the Kuhn Formaldehyde Generator Company, with interest at 6% per annum. Upon motion of O. B. Blackburn, the President and Secretary and Treasurer were authorized, empowered and directed to pay the said sum of \$7,000. in cash, and to execute the two notes of this Company as aforesaid.

It was reported to the meeting that the National Vaccine and Antitoxin Establishment had executed its deed and delivered its property and assets to the Company, and that the same were now in charge and possession of Charles M. Campbell, President, and R. K. Helphenstine, Secretary and Treasurer; and that the check of the Company for Fifteen Thousand (\$15,000.) Dollars, had been delivered to Ralph Walsh, its President in full payment for same, said check being payable to the National Vaccine and Antitoxin Establishment. This action was unanimously ratified and approved. It was announced at the meeting that the following stockholders had entered into the following pooling agreement, and asked that the same be spread upon the minutes of the Company, which was accordingly done:

Whereas, This agreement made this twenty-ninth day of Oct. 1906, between Charles M. Campbell, Charles E. Wood, O. B. Blackburn, Kuhn Formaldehyde Generator Co., James F. Peyton, Benjamin E. Taylor, R. K. Helphenstine.

Whereas, The parties named are all owners of a majority of the stock of the National Vaccine and Formaldehyde Company,

Whereas, we have agreed that said stock shall be pooled and when voted at stockholders' meetings of the Company shall be voted as a unit for a period of three years,

Now therefore this agreement witnesseth, That any disagreement that shall exist or arise between the above named stockholders, as to voting of their respective stock shall be first determined among themselves by a majority vote of said stockholders and when so determined, then the whole of said stock shall be voted at all stockholders' meetings as a unit. This is done to insure cooperation of action and the control of the company, and in order to continue Charles M.

51 Campbell and Charles E. Wood in the control and management of the Company. And the stock of the above individuals is to be left with Charles E. Wood as further evidence of good faith, only to be released by consent.

(Signed) C. E. WOOD.

C. M. CAMPBELL.

JAMES F. PEYTON.

KUHN FORMALDEHYDE GENERATOR
COMPANY.

R. K. HELPHENSTINE.

BEN. E. TAYLOR.

O. B. BLACKBURN.

Upon motion of Ben. E. Taylor it was unanimously agreed that the preferred stock of the Company, now hypothecated with the International Trust Company of Maryland, shall, when released by said Company become the property of the Company and covered back into the Treasury hereof, not to be again issued unless by a majority vote of all the common stockholders, all rights of the present subscribers thereto being relinquished except so far as it effects the rights of the said Trust Company.

The following letter was authorized to be written and sent to the International Trust Company of Maryland.

OCTOBER 27TH, 1906.

International Trust Company, Baltimore, Md.

GENTLEMEN: We herewith enclose you 2,000. shares of the stock of this Company, as per agreement, with the information that our board has called for the first payment of the subscription to the stock. We have drawn one check for the sum of \$350., made payable to C. C. Carlin, which you will please honor. In future you will only honor checks when signed by C. M. Campbell, President, and R. K. Helphenstine, Treasurer, the Company having
52 made this change in its officers to day. We enclose copy of resolution of the stockholders and officers of the Company which will be your authority for honoring their checks.

Respectfully, (Signature, etc.)

And there being no other business before the meeting, these minutes were read as a whole and unanimously adopted.

R. K. HELPHENSTINE, *President*.

JAMES F. PEYTON, *Secretary*.

Witness was handed a letter by counsel, which witness identified, identifying the signatures thereto of himself, J. F. Peyton, and C. M. Campbell; witness further testified that said letter was prepared at the offices of Wood, Harmon & Company, at a meeting of the stockholders of the Vaccine Company, on October 27th, 1906; that B. E. Taylor was present voting defendant's proxy; that the proxies were voted for the sending of the letter; that the letter after being signed was sent to the Trust Company. Whereupon plaintiff offered said letter in evidence. Defendant objected to this, on the ground that the letter was a statement by the officers of the corporation, or by the corporation, not in privity with the defendant, even if he were a stockholder in the corporation, said statement being to a third party, and not being binding upon the defendant. This objection was overruled by the Court, whereupon the defendant was allowed an exception. The letter was then read to the jury as follows:

“National Vaccine & Formaldehyde Co.

Wood, Harmon & Co., Suburban Real Estate, 525 13th Street N. W.

WASHINGTON, Oct. 27, 1906.

53 International Trust Co. of Md., Baltimore.

GENTLEMEN: We herewith enclose you 2000 shares of the stock of this company, as per agreement, with the information that our board has called for the first payment of the subscription to the stock. We have drawn one check upon our deposit for the sum of \$350, made payable to C. C. Carlin, which you will please honor. In future you will only honor checks when signed by C. M. Campbell, President, and R. K. Helphenstine, treasurer, the company having made this change in its officers today. We enclose copy of resolution of the stockholders and officers of the company which will be your authority for honoring their checks.

Respectfully,

NATIONAL VACCINE & FORMALDEHYDE
COMPANY,

By R. K. HELPHENSTINE, *President*.

JAMES F. PEYTON, *Treasurer*.

Following are the signatures referred to:

C. M. CAMPBELL.

R. K. HELPHENSTINE.”

Further testifying, witness testified that he could not recall whether Benjamin E. Taylor offered any resolutions at the meeting on October 27th. He identified certificates of stock, signed by himself as President and J. F. Peyton as Secretary, and testified that they were the certificates referred to in the letter; witness was handed a letter

dated October 30th, 1906, and identified the signatures thereto as those of C. M. Campbell, president, and R. K. Helphenstine, secretary and Treasurer, and identified a seal thereon as the corporate seal of the National Vaccine & Formaldehyde Company; witness further testified that said letter was sent to the International Trust Company.

“Q. Doctor, after the sending of this letter of October 27th to the trust company stating that the first call had been made, will you state how that call was paid? A. That was paid later, on the 30th.

“Q. Yes, and how was that done? A. We borrowed money in Alexandria, had it placed to our credit.

“Q. Do you recall how much? A. Six thousand dollars.”

Witness further testified that said \$6,000 was raised before the sending of the letter of the 30th.

Being cross examined by the defendant, witness further testified that at the time he signed the letter of October 27th, no call upon the stock of the National Vaccine & Formaldehyde Company had been made; that there was a vote upon the letter; that there was not a dissenting vote at the meeting, and that Benjamin E. Taylor was present throughout; that he understood that a call was to be made, and on that understanding signed the letter, but that no call was made; witness repeated that no call was made and subsequently stated that no call was made in the sense of sending out letters to the different members; that with C. M. Campbell he visited Alexandria on October 30th, and by means of a note signed by them, secured \$6,000, which was placed to the credit of the Vaccine Company; that the amount of the note was repaid within three or four days; that the money was secured to pay the first call upon the stock of the company.

Upon redirect examination, witness further testified:

“Q. What was the understanding, Dr. Helphenstine, at that meeting, as to what calls should be sent, if any, to those gentlemen who were there present? A. Those others who were present, there was no necessity for sending any notice at all; we agreed that that should be attended to at once.

“Q. Was or was it not generally understood among you that that was the situation? A. Yes, it was not attended to then.”

C. C. CARLIN, being first duly sworn, testified that he had signed the document marked “Plaintiff’s Exhibit No. 1,” for \$1000 par value of the stock of the National Vaccine & Formaldehyde Company; that he visited Baltimore at the time the loan by plaintiff to the National Vaccine and Formaldehyde Company was negotiated; that the officers of the Trust Company said they were paying over a portion of the money and retaining the rest, and they wanted the call to be regularly made, and the witness assured Mr. Rowland that this would be done; that the subscription lists were delivered to the Trust Company at the time the notes were given; that witness and R. K. Helphenstine made a report of said negotiations to a later meeting of the stockholders of the Company.

“Q. What did you say in your report about the first call, if anything? A. I told them that the first call would have to be made.”

Witness further testified that the draft of the letter of October 27th was prepared and passed upon during the meeting, and later
56 reduced to final form; witness identified said letter as being in the handwriting of James F. Peyton.

"Q. Do you know whether or not Mr. Taylor and Mr. Helphenstine voted the proxies in favor of sending the letter that you recollect? A. They were voted.

"Q. You say they were all voted? A. Yes sir, everybody voted and everybody there understood that the call was to be made; Mr. Campbell was to make it."

Being cross examined by the defendant, witness further testified that he had paid to the plaintiff \$900 on his liability as a subscriber to the stock of the Vaccine Company, upon suit being threatened, to that witness and Louis C. Barley together had paid \$1800 or \$1750; that the understanding of all present at the meeting of October 27th was that that should be considered a call; and that Campbell was to send out and collect the money and get it in; that his idea was that the Trust Company was to be informed that the call had been ordered, and that when the money was paid further correspondence would take place between these gentlemen and the Trust Company.

Witness testified on re-direct examination that Peyton, the Secretary of the Vaccine Company, lived in Alexandria, Va., but that since last Fall, had spent most all of his time at Lynchburg, Va.

CHARLES M. CAMPBELL, being first duly sworn, testified that he had signed the stock subscription agreement; that he had seen the letter of October 27th written on the day of its date, at the office of Wood
57 Harmon & Co., at a meeting of the stockholders of the National Vaccine & Formaldehyde Company; that he did not sign the letter, but placed his signature thereon as a bank signature; that Benjamin E. Taylor was present voting proxies, including that of defendant; that the letter was read to the meeting and approved; that Taylor approved of every action taken; that it was generally understood and discussed at that meeting that the Trust Company required a call to be made; that on October 30th to the best of witness' recollection, an exigency arose necessitating the drawing of money from the Trust Company; that a meeting of stockholders was called, and the matter taken up.

"Q. Simply state what you did. A. On the advice of Mr. Carlin the officers of the Company went to Alexandria and were introduced there by Mr. Carlin and Judge Barley to one of the banks, I think it was the Alexandria Bank, and arrangements had been made there and the necessary ten per cent. call was borrowed from the bank on a note, first signed by the officers of the Company through an inadvertence, and the same afternoon corrected and the note substituted containing quite a number of stockholders."

Witness identified a letter and telegram, and stated that they had been sent to the International Trust Company of Maryland; that this was after the stockholders' meeting of October 30th.

Being cross examined by the defendant witness further testified that the meeting of October 30th to which he had testified in chief

was informal, called on the telephone, that he did not know whether or not Benjamin E. Taylor was present; that the meeting was the result of a telephone message received from Baltimore setting forth the requirement that the first call be paid; that he did not
 58 know whether or not Benjamin E. Taylor knew of the transaction of the loan in Alexandria; that Taylor was not in good order with the company, being a discharged employé; that no call was ever made for the first ten per cent. of the stock subscriptions, except by the transaction in Alexandria; that the signatures of R. K. Helphenstine and James E. Peyton as officers of the Vaccine Company were affixed to the letter of October 27th during the meeting; that new officers had been elected at said meeting to supersede said Peyton and Helphenstine; that he had agreed to settle his liability to the trust company for ninety per cent. of \$16,500, the amount of his subscription, in full; that he had been sued by the plaintiff, and had settled.

LOUIS C. BARLEY, having been first duly sworn, testified that he had signed the stock subscription agreement for \$1000, that he had settled with plaintiff for \$800, that he attended the stockholders' meeting of October 27th, that Benjamin E. Taylor was present holding and voting proxies; that the letter dated October 27th was discussed in the meeting and approved and signed before the meeting adjourned; that it was generally understood that Mr. Campbell would make the first call on the stock subscription, that it was also understood that the call had been ordered and had been made.

Being cross examined by the defendant, witness further testified that he had not paid the first call; that the election of officers preceded the discussion of the letter aforesaid at the meeting of October 27th.

SAMUEL C. ROWLAND, being first duly sworn, testified that
 59 he was vice-president of the International Trust Company of Maryland; that on October 22nd, 1906, the company loaned the National Vaccine & Formaldehyde Company \$50,000, accepting one note for \$9,000, which was duly paid, one note for \$11,000, and two notes for \$15,000 each, maturing at three, six, nine and twelve months respectively which had not been paid; whereupon plaintiff offered in evidence the unpaid notes, which, except as to the varying amounts, were of like tenor, as follows, certain immaterial printed stipulations being omitted:

"\$15,000.

Oct. 22, 1906.

"On April 30th 1907 after date National Vaccine & Formaldehyde Co. promises to pay to the order of International Trust Company of Maryland, Baltimore, fifteen thousand dollars, for value received, having pledged herewith to the holder of this note uncollected balance of \$54,000 out of subscription of \$60,000 to the capital stock of the National Vaccine & Formaldehyde Co., also covers three other notes of even date due Jan. 31, July 31, and October 31, for \$9,000.00, \$15,000.00 and \$11,000.00 respectively, also the \$60,000 shares preferred and \$60,000 common stock."

Witness further testified that plaintiff received the collateral mentioned in the notes, and thereupon identified the stock subscription agreement received by the company, which he stated was delivered to him with the written assignment thereof on October 22, 1906.

Whereupon plaintiff after having introduced evidence tending to show subscriptions to the extent of more than \$50000 worth of preferred stocks, offered in evidence said agreement, to which defendant objected on the ground that there had been no evidence adduced to show that a call had been made upon said stock subscription

60 agreement, that no evidence had been adduced to show that there had been a call upon said stock subscription agreement before it had been assigned on the 22nd day of October, 1906, in the absence of which nothing could have been due and owing thereunder by the defendant either to the National Vaccine & Formaldehyde Company, or to the International Trust Company of Maryland. This objection was overruled by the Court, whereupon the defendant was allowed an exception. The said agreement was then placed in evidence as follows:

“This agreement, made and entered into this 5th day of October, Nineteen Hundred and Six, by and between the National Vaccine and Formaldehyde Company, a corporation organized under the laws of the State of Virginia, party of the first part, and the Subscribers hereto, parties of the second part.

“Witnesseth: Whereas the said party of the first part has a capitalization of Five Hundred Thousand (\$500,000) Dollars, represented by Sixty Thousand (\$60,000) preferred 6% stock, and Four Hundred and forty Thousand (\$440,000) Dollars common stock; and

“Whereas said party of the first part is desirous of disposing of said preferred stock and offers same for subscription upon the terms and conditions hereinafter recited, all of which are hereby accepted and agreed to by the subscribers, the said parties of the second part; and it is further agreed that should said party of the first part desire to secure a loan upon the said stock and subscriptions, secured by

61 the subscriptions of the subscribers hereto, it, the said party of the first part shall have such right and authority from the said parties of the second part; and

“Whereas each subscriber shall receive from the said party of the first part an amount of common stock equal to the amount of his subscription for preferred stock at par value, being a common stock bonus of one hundred (100) per cent.,

“Now therefore, in consideration of the premises and of one (\$1.) Dollar, to each of them in hand paid by the said party of the first part, the subscribers severally and not jointly, hereby subscribe each to the number of shares of the preferred stock, heretofore recited, set opposite their respective signatures hereto, at and for the price of par, Ten (\$10.00) Dollars per share and agrees to pay for the same, in the following manner, it being agreed and understood that no call shall be made upon the subscribers until at least Fifty Thousand (\$50,000.) Dollars of said preferred stock shall have been subscribed:

"Ten (10%) per cent. upon first call;

"Fifteen (15%) per cent., three (3) months after first call;

"Twenty-five (25%) per cent., six (6) months after first call.

"Twenty-five (25%) per cent., nine (9) months after first call.

"Twenty-five (25%) per cent. twelve (12) months after first call.

62 "The subscribers hereto further agree that the said party of the first part may assign these subscriptions to any individual, individuals, corporation or corporations, from whom it may procure said loan, together with said stock as collateral for said loan and the subscribers further agree that all the rights and privileges herein granted to the said party of the first part by said subscribers, shall be assignable to and thereupon may be exercised by such assignee.

The subscribers further agree that the failure of any subscriber to perform any of his undertakings hereunder shall not affect or release any other subscriber, and that upon such failure the said party of the first part, or its assignee, as aforesaid, shall have the right at its election to terminate the interest of such subscriber in and to said stock as aforesaid, and to hold him liable for, and to recover all damages resulting from such failures, and the said party of the first part, or its assignee may accept a new subscriber or subscribers, from time to time in the place of any subscriber or subscribers who shall so fail to perform his or their undertakings hereunder; and the subscribers further agree that each and every one of them will upon reasonable request, from time to time, execute and deliver and perform all further instruments and agreements necessary and proper to carry this agreement into effect; it is understood and agreed that nothing contained in this agreement or otherwise shall constitute the subscribers hereto partners with one another, or render them liable to contribute in any event more than their ratable amount as hereto subscribed;

63 "It is further understood and agreed that this agreement shall be binding upon the parties hereto, and their respective executors, administrators, survivors, successors and assigns. "It is further understood and agreed that this agreement shall be binding upon the parties hereto, and their respective executors, administrators, survivors, successors and assigns.

"In witness whereof, the said The National Vaccine and Formaldehyde Company has caused this agreement to be signed by its president, and its corporate seal affixed, attested by its secretary, and the various subscribers have signed their names and opposite thereto have respectively recited the amount of their subscriptions and the amount of stock by each so subscribed on the day and year first above written.

[Corporate Seal.]

THE NATIONAL VACCINE AND
FORMALDEHYDE COMPANY,

(Signed)

By R. K. HELPHENSTINE, *President.*

Attest:

(Signed) JAMES F. PEYTON, *Secretary.*"

Following were the signatures: on a separate page, of various persons, including the defendant's signature, as follows:

	Preferred	Amount	Common.
Geo. E. Howard	500	\$5,000	500.

The plaintiff thereupon offered in evidence the written assignment of said subscription agreement, which appeared beneath the
 64 signatures aforesaid. To this the defendant made objection, on the ground that said assignment did not conform to the declarations filed in the causes, the assignment being not for ninety per cent. This objection the Court overruled, whereupon the defendant was allowed an exception. The assignment was placed in evidence as follows:

"BALTIMORE, MD., *October 10, 1906.*

"We, the president and Secretary of the National Vaccine and Formaldehyde Company, do hereby assign to the International Trust Company of Maryland, the balances of subscription to the preferred stock of the National Vaccine and Formaldehyde Company amounting to 450 shares. This assignment to secure the payment of the company's notes amounting to \$50,000.00, of even date herewith."

R. K. HELPHENSTINE, *President.*
 JAMES F. PEYTON, *Secretary.*

A similar assignment for 5500 shares was also offered in evidence subject to the same objection and exception.

The witness further testified that R. K. Helphenstine, president, James F. Peyton and C. C. Carlin, of the Vaccine Company, represented said company in the negotiations in Baltimore of the loan of \$50,000 on October 22nd, 1907.

"Q. Now, will you state whether you made the loan of \$50,000 at this time, and, if not, why not? A. After everything had been agreed to, and just before they were leaving, I said to the gentlemen that I presumed, of course, that this ten per cent. had been paid in
 and they said no——

65 To which testimony the defendant objected, on the ground that whatever was said by parties quoted was improper as against the defendant, unless the parties quoted were shown to be agents of the defendant; that in the absence of proof of privity, or some relationship of agency, or of ratification, such testimony was improper. This objection was overruled by the Court, whereupon the defendant was allowed an exception.

The witness further testified that he learned from Helphenstine, Peyton and Carlin that the first call had not been made and paid; that

"We rather objected to turning over the money because they had not complied with the agreement, as we understood it, but they said it was very necessary that they have some funds at once, and we thereupon, after talking the matter over, agreed to give them

\$22,025.50, out of which they paid the commission and interest, and told them we would not honor any more checks on account until the call had been made and paid."

Witness further testified that at the time the notes were delivered, the following resolution authorizing the loan was also delivered, the resolution thereupon being offered in evidence:

At a meeting of the Incorporators and Directors of the National Vaccine and Formaldehyde Company, Incorporated, held 107 Fairfax Street, in the City of Alexandria, Virginia, it was upon motion of O. B. Blackburn, unanimously determined to negotiate a loan of Fifty thousand dollars from the International Trust Company of Baltimore, Maryland.

And it was resolved in order to effectuate the same that the President R. K. Helphenstein, and the Secretary, James F. Peyton,
66 be and they are hereby authorized to execute the note or notes of the Company for the sum or sums not to exceed in the aggregate Fifty thousand dollars. And the said President and Secretary are further authorized and directed to assign and deliver unto the International Trust Company of Baltimore, Maryland, the subscription list of the Company as collateral security for the payment of aforesaid sum or sums or notes. Fifty-four thousand dollars of said subscription to be held as collateral security, the first payment of 10% not being pledged as security but paid into the treasury of the Company, the total subscription list being for Sixty thousand dollars.

The above is a true copy of the minutes of the Company.

[Corporate Seal.]

(Signed)

R. K. HELPHENSTINE, *President.*

Attest.

JAMES F. PEYTON, *Secretary.*

Objection was made to the introduction of this resolution, which objection was overruled by the Court, and an exception duly noted.

Witness further testified that he remembered the receipt of the letter dated October 27th; that plaintiff paid the check of \$350 therein referred to, after receiving the letter, and in consequence of it but that plaintiff wanted further assurance that the first call
67 had been made and paid; that on October 30th a check for \$15,000 was presented for payment, which plaintiff declined to pay, but asked the collecting bank to hold same until later in the day; that about three o'clock on that day, plaintiff communicated with Charles M. Campbell in Washington, by telephone, and later received a telegram, and the next morning a letter. Witness identified a telegram and a letter, which were thereupon offered in evidence as follows:

Telegram.

“WASHINGTON, D. C., *October 30, 1906.*

“The International Trust Company, Baltimore, Maryland.

“The ten per cent. call is being paid in to the credit of the Company and will be completed before three o'clock.

“(Signed)

THE NATIONAL VACCINE AND
FORMALDEHYDE COMPANY,
By C. M. CAMPBELL, *President.*

Letter.

“WASHINGTON, D. C., *October 30, 1906.*

“International Trust Company of Maryland, Baltimore, Maryland.

“GENTLEMEN: We beg to advise you that stockholders have this day deposited to the credit of the company the sum of \$6,000, being the amount of the first call under subscription contract. Wired you to this effect today at 2:15 p. m., which wire was confirmed by telephone at 3:15 p. m., and was advised by you that the checks which had been given would be honored.

Yours very truly,

“(Signed)

THE NATIONAL VACCINE AND
FORMALDEHYDE COMPANY,
By CHARLES M. CAMPBELL, *Pres.*
R. K. HELPHENSTINE,
Secretary and Treasurer.”

68 To which telegram and letter the defendant objected, on the ground that said telegram and letter were sent by parties not parties to the causes herein, and that in the absence of evidence showing or tending to show privity between said parties and the defendant, or ratification of said letter and telegram by the defendant, said letter and telegram, were, both and each, inadmissible as against the defendant. This objection was overruled by the Court, whereupon the defendant was allowed an exception.

The witness further testified that the \$15,000 check was paid the next morning, on the strength of the conversation and telegram, and shortly thereafter the balance of the loan was paid; that plaintiff received \$60,000 of the preferred and \$60,000 of the common stock of the Vaccine Company as further collateral security for the loan, the same having been issued direct to and in the name of W. D. Focke, assistant secretary and treasurer of plaintiff corporation; that \$29,955.16 of the loan of \$50,000 was still due plaintiff; that suits had been brought against all the subscribers except Barley, Carlin and Riordan, who agreed to pay; that notices had been sent to the defendant calling for the payment on January 30th, April 30th, July 30th and October 30th, 1907, of the installments of the stock subscription claimed to be due on those dates; and that when the subscriptions were paid the plaintiff was ready to return the stock pledged as collateral.

Being cross examined by the defendant, witness further testified that in the telephone conversation with Campbell above referred to he asked Campbell to confirm by letter what he had said over the telephone; that on October 22, 1906, plaintiff took from the
69 \$22,025.50 paid to the Vaccine Company out of the \$50,000 borrowed, the sum of \$2,025.50 interest on \$50,000 for the entire period of the loan, and \$2,000, being a four per cent. commission.

Witness stated that a number of settlements had been made by the subscribers; that Barley and Carlin had settled; that Wood and Campbell had agreed to settle in full and have paid something on account of this settlement, after suit had been entered against them; that Schiffman had been sued, and that after obtaining a judgment against him in a suit for 40% of his subscription, he paid that judgment in full and plaintiff agreed to extend the balance due; so that with him as with Wood and Campbell, there has been a settlement but not a payment; that plaintiff sued and recovered a judgment against Spencer, who paid a portion; but no agreement had been entered into with him; that Riordan has paid on account, as has Dr. Helphenstine, with whom plaintiff made an agreement; that no judgment was obtained against either Campbell or Wood; that Campbell had not paid but \$1,000 out of the \$2,500 he agreed to pay on December 1, 1907; thereupon attorney for defendant asked the following question:

"Q. Now, Mr. Rowland, as a matter of fact you have accepted settlements from various stock subscribers for an amount which exceeds greatly the amount which is due your company; is that not a fact?"

To this question the plaintiff objected. The objection was sustained by the Court, whereupon the defendant was allowed an exception.

Being further cross examined, witness testified that he had
70 verified an affidavit of merit dated June 7th, 1907, in the first action against defendant, in which the following appeared:

"Deponent further says that on information derived from the officers of said Vaccine Company that on or about Oct. 10th, 1906, the Vaccine Company made a call;"

that his recollection was vague as to the call; that, the affidavit aforesaid notwithstanding, witness knew on October 22nd, 1906, that the call had not been made and paid; that the \$22,025.50 was paid on October 22nd, 1906, when plaintiff had this knowledge that the call had not been made and paid; that plaintiff was not satisfied with the information contained in the letter of October 27th, although the \$350 check was paid, which was referred to therein; that the incident which led plaintiff to release the \$15,000 on October 30th was the statement received that day that the call had been paid; that the interest had been computed on the \$50,000 loan from the 22nd day of October, and the loan had been made on that date.

Being further cross examined, witness was handed a copy of an

agreement, between C. M. Campbell and the International Trust Company of Maryland, and asked if he had entered into such an agreement with these certain stockholders heretofore mentioned, on behalf of the Trust Company. The agreement was as follows:

Memorandum of agreement made and entered into this — day of November, 1907, by and between the International Trust Company of Maryland, a corporation acting through its attorney,
71 Walter C. Clephane, party of the first part, and Charles M. Campbell, of the City of Washington in the District of Columbia, party of the second part;

Whereas the said party of the second part on or about the 5th day of October, 1906, signed a certain agreement in and by which he subscribed for certain capital stock in the National Vaccine and Formaldehyde Company, a corporation organized under the laws of the State of Virginia, to the extent of One Thousand Six Hundred and Fifty (1650) shares of the preferred stock of the said company, at the rate of ten dollars (\$10) per share, making a total liability under the said contract of sixteen thousand five hundred dollars (\$16500);

Whereas said stock subscription agreement provided upon its face that it might be assigned to any corporation from whom said Vaccine Company might procure a loan as security for said loan; and

Whereas said subscription, less ten (10) per centum of the amount thereof, was duly assigned by said Vaccine Company to the party of the first part hereunder, as security for a certain loan, amounting in all to fifty thousand dollars (\$50,000) obtained by said Vaccine Company from said party of the first part; and

Whereas said loan has long since matured and is still unpaid, and certain proceedings at law and in equity are now pending against said National Vaccine and Formaldehyde Company to realize as much of said loan as can be obtained from the assets of said company; and

72 Whereas the said Campbell has been sued in the Supreme Court of the District of Columbia in a certain suit at law numbered 49522, based upon his liability for 40 per cent of the amount due under said subscription agreement, and has interposed certain pleas and an affidavit of defense in said case; and a declaration has been prepared against him ready for filing in said court in an action at law based upon his liability for the additional 50 per cent due under said subscription agreement; and

Whereas it is the desire of both parties hereto to settle said litigation in an amicable manner;

Now therefore this agreement witnesseth that the parties hereto for and in consideration of the sum of one dollar (\$1) by each to the other in hand paid, the receipt whereof is hereby acknowledged, and in order to compromise and settle the said litigation and all liability arising under said subscription agreement, do hereby mutually covenant and agree as follows:

First. The said party of the second part shall immediately with-

draw the pleas and affidavit of defense filed by him in said case at law numbered 49522.

Second. The said party of the second part shall immediately confess judgment in the suit last aforesaid, as well as upon the suit proposed to be brought as aforesaid, upon his liability for 50 per centum of the amount of stock subscribed for in said subscription agreement.

73 *Third.* That the said party of the second part hereby acknowledges that he is justly indebted to the said party of the first part under and by virtue of said subscription agreement in the full sum of fourteen thousand eight hundred and fifty dollars (\$14,850) with interest as follows: On the sum of two thousand and four hundred and seventy-five dollars (\$2475) from the thirtieth day of January, 1907; upon four thousand one hundred and twenty-five dollars (\$4125) from the thirtieth day of April, 1907; the sum of four thousand one hundred and twenty-five dollars (\$4125) from the thirtieth day of July, 1907; and upon the sum of four thousand one hundred and twenty five dollars (\$4125) from the thirtieth day of October, 1907. Said party of the second part also admits his liability for the costs of said suits.

Fourth. And in order to wipe out and satisfy his said liability the said party of the second part agrees to pay on the first day of December, 1907, to the said party of the first part, the sum of two thousand five hundred dollars (\$2500); and he also agrees to pay to said party of the first part at its office in the City of Baltimore in the state of Maryland, the sum of five hundred dollars (\$500) on the first day of each month thereafter until his liability under this agreement is fully ended and satisfied.

74 *Fifth.* And the said party of the second part hereby agrees to execute contemporaneously with the execution of these presents a release of a certain mortgage bearing date on the twenty-seventh day of October, 1903, which constitutes a lien upon certain real estate owned by the said National Vaccine and Formaldehyde Company in the State of Maryland, which said mortgage is duly recorded among the land and mortgage records of Prince George's County, in said state, in liber 31, at folio 136.

Sixth. And in case the said party of the second part should default in any of the obligations herein assumed by him, or in any of the payments hereby agreed to be made by him, then the said party of the first part shall be at liberty to immediately place upon record the confession of judgment in said suit at law numbered 49522, and to file the other suit at law, hereinabove referred to, and the confession of judgment upon the declaration in the suit last aforesaid.

Seventh. And the said party of the first part agrees that so long as the said party of the second part shall in every respect comply with the covenants and obligations herein assumed by him, it will not take any further steps, by legal proceedings or otherwise to enforce the liability herein admitted by the said party of the second part, except in strict conformity with this agreement, and that it will not obtain any judgment or file any suit against the said party

of the second part upon his liability under the subscription hereinabove described.

Eighth. That the said party of the first part shall proceed with all due diligence to realize what can be realized from the
75 assets of the National Vaccine and Formaldehyde Company, and as soon as any amounts which may be realized from the said assets and from collections made from the other subscribers to the subscription agreement aforesaid shall, together with the amounts paid by the said party of the second part, under this agreement, equal the sum then due to said Trust Company, with interest, by reason of the loan of Fifty Thousand (\$50,000) hereinabove recited then the said party of the second part is to be forthwith discharged from paying any further amount under and by virtue of this agreement.

Ninth. And it is further distinctly understood and agreed that:

Whereas the said party of the first part now contends that the said party of the second part is liable to it in a sum of money greater in amount than fourteen thousand eight hundred and fifty dollars (\$14850) as aforesaid, upon the theory that the said loan of Fifty Thousand dollars (\$50,000) or a large part of the same was obtained by said Vaccine Company upon the faith of certain representations made by the party of the second part, which the said party of the first part contends were not in accordance with the facts, the said party of the first part waives none of its rights to proceed against the said party of the second part by reason of any liability which may exist against him on this account, but the said party of the first
76 part agrees not to take legal proceedings against the said party of the second part to enforce said liability during the period which this agreement gives the said party of the second part to liquidate the obligations admitted herein, provided the said party of the second part faithfully performs each and every of his obligations assumed herein, and the said party of the second part by admitting his liability upon said subscription agreement does not admit any liability whatsoever on account of the claim in this paragraph recited, and the said party of the second part agrees that he will not plead the statute of limitations to any action which may be subsequently brought by said party of the first part upon the liability in this paragraph suggested; but in the event that the said party of the second part shall at any time default in any of the covenants assumed by him under this agreement then the said party of the first part may proceed at any time within its discretion in the endeavor to enforce the said liability by judicial proceedings, said party of the second part reserving all his defense to such proceedings except the defense of the statute of limitations.

And it is further understood and agreed that the obligations assumed hereunder and all rights conferred hereby shall be enforceable and obligatory upon the heirs, executors, and administrators of the party of the second part, and the successors of the party of the first part.

In testimony whereof the said party of the first part has executed

these presents through its attorney, the said Walter C. Clephane, and the said party of the second part has likewise
77 executed these presents in his own proper person, at the City of Washington in the District of Columbia, on the day and year first hereinabove mentioned.

Whereupon plaintiff objected to the examination of the witness in regard to said agreement, and to the introduction thereof, on the ground that the same was an agreement between the plaintiff and C. M. Campbell, and was a private matter between said parties; and the Court thereupon examined said agreement, and later ruled as follows:

"I am ready to rule upon that paper. I find nothing in this paper that would justify its admission on any ground thus far suggested to the court, and therefore the objection to its introduction is sustained."

Whereupon the defendant was allowed an exception.

Upon redirect examination the witness stated that plaintiff would not allow the balance of the loan of October 22nd to be disbursed until the officers of the Vaccine Company insured plaintiff that the call had been regularly made and paid.

CHARLES M. CAMPBELL, having already been duly sworn, was recalled for further cross examination. Being cross examined by the defendant, witness was handed a copy of the agreement last set forth herein, which he identified as a copy of an agreement between himself and plaintiff; witness testified that he had been sued by plaintiff, that he was uncertain of the amount, that he did not
78 know whether he had confessed judgment or not; that the paper would show; that he did not remember the eighth clause of the agreement.

"Q. Did not the International Trust Company promise you that it would proceed diligently against every other subscriber, and that as soon as it had fully made out its claim against the Vaccine Company, you would be relieved of the further partial payments upon your confessed obligation."

To which objection was made by the plaintiff. This objection was sustained by the Court, whereupon the defendant was allowed an exception.

"Q. In the negotiations preceding this agreement were you informed by a representative of the Trust Company that they had a right, in their opinion, to bring an action against you, not upon your subscription agreement, but on the ground of your representations made to them?"

To which objection was made by the plaintiff. This objection was sustained by the Court. Whereupon the defendant was allowed an exception.

The defendant then offered in evidence the eighth and ninth clauses of the agreement, for the purpose of showing bias on the part of the witness in favor of the plaintiff. To which the plaintiff objected. This objection was sustained by the Court, whereupon

the defendant was allowed an exception. The witness stated that no criminal prosecution was threatened against him at any time, but plaintiff's counsel had told witness that plaintiff had been largely influenced by the letter and telegram sent by witness.

"Q. If these suits should go against the defendants you expect to get rid of paying quite a lot of money?

To which question objection was made by the plaintiff, whereupon the Court ruled as follows:

79 "If any considerable number of them were insolvent, the situation might be quite different. I think it is clearly objectionable. The objection is sustained."

Whereupon the defendant was allowed an exception.

The defendant thereupon offered the agreement as a whole for the purpose of showing the bias of the witness. To which the plaintiff objected. This objection was sustained by the Court, whereupon the defendant was allowed an exception.

The plaintiff also offered in evidence a certified copy of the certificate of incorporation of the National Vaccine and Formaldehyde Company, which is in the words and figures following:

Certificate of Incorporation of the "National Vaccine and Formaldehyde Company, Incorporated."

This is to certify that we do hereby associate ourselves to establish a corporation under and by virtue of the provisions of an Act of the General Assembly of the State of Virginia, entitled "An Act Concerning Corporations," which became a law on the twenty-first day of May, 1903, for the purposes and under the corporate name hereinafter mentioned, and to that end we do by this our certificate, set forth as follows:

A.

The name of the corporations is to be the "National Vaccine and Formaldehyde Company, Incorporated."

80

B.

Its principal office in this State is to be located at 107 North Fairfax Street in the City of Alexandria, Virginia, but the Board of Directors shall have authority, from time to time, to create branch offices and agencies at such place or places as to them may seem proper, and C. C. Carlin, Attorney at law, practicing in the Courts of this State, is named as attorney upon whom process may be served.

C.

The purposes for which it is formed are to manufacture, buy and sell Vaccine, Vaccine Points, Antitoxins, Pharmaceuticals, apparatus and devices for the purpose of generating Formaldehyde gas, and to lease or rent said apparatus and devices, and to lease, rent, buy and sell at royalty, patents upon said apparatus and devices, and all other

clared that the Incorporators by virtue of the premises, and their associates and successors "are hereby made and created a body politic and corporate" and that the said certificate of incorporation with the said order of the State Corporation Commission was certified to the Secretary of the Commonwealth for record, and by him recorded in his office on the 3d day of October, 1906, and that such action was on the date last aforesaid certified to the clerk of the Corporation Court at Alexandria.

Thereupon the plaintiff rested, and the defendant moved that the Court direct a verdict for the defendant on the grounds:

a. That the defendant was suing upon the assignment of a stock subscription agreement, and that there was no proof adduced that a call had been made upon said stock subscription agreement prior to
83 or at the time of said assignment, and consequently nothing was conveyed by said assignment to plaintiff, upon which recovery could be made from defendant;

b. That there was no proof that a call had been made upon the stock subscriptions agreement at any time, and that under said agreement, a call for the first ten per cent. of said subscriptions was necessary to create any liability on the part of the defendant.

This motion was overruled by the Court, whereupon the defendant was allowed an exception.

Whereupon, the defendant to maintain the issues upon his part, introduced the following testimony:

THOMAS F. MCGREW, being first duly sworn, testified that he occupied a desk in the same room with defendant at the time defendant signed a paper brought there by Benjamin E. Taylor and O. B. Blackburn; that he heard the conversation between Taylor, Blackburn and defendant at that time; that defendant was not in witness' presence offered any stock; that defendant was told he would never be called upon to pay any money and that he would not be responsible financially for anything; that Taylor and Blackburn told defendant that before the company was organized, defendant would be given security on real estate against any possible loss; that witness heard nothing said about stock subscriptions.

The defendant, GEORGE E. HOWARD, being first duly sworn, testified that he had not signed the paper sued upon in the form it now appeared; that he had signed his name to the last sheet; that
84 said sheet at that time was attached to two or three thin sheets of paper similar to itself, and not of the thick kind of paper upon which the agreement now sued upon was type-written; that there was not more than half or two-thirds of one sheet of typewriting upon the agreement he signed; that the words "Underwriting Agreement" appeared upon the sheet of typewritten matter to which the sheet he signed was attached; that he relied upon Taylor's statement that said agreement was an underwriting agreement, and that before it was used in any way to involve his credit, he would be given ample security satisfactory to himself; that he was never offered any stock in the Vaccine Company, and was expressly told by Taylor and Blackburn that he was not subscribing for stock, that there was no stock for sale.

BENJAMIN E. TAYLOR, having already been sworn, testified that he and Blackburn secured defendant's signature; that defendant would not be called upon to pay anything under the agreement unless everything laid down & nobody did anything towards the success.

Witness further testified that he had attended the meeting of the Vaccine Company on October 27th, 1903.

"Q. Have you any recollection of a letter being presented to that meeting, and voted upon and approved by the meeting. A. No.

"Q. I ask you to read the letter which I hand you. A. I read it before in the other cases.

"Q. Did you ever hear that letter read in a meeting of the National Vaccine and Formaldehyde Company? A. No sir.

"Q. Did you ever vote that such a letter be sent by the National Vaccine and Formaldehyde Company? A. No sir.

85 "Q. You held Mr. Howard's proxy in the meeting? A. Yes.

"Q. Did you ever vote to make any representations to the International Trust Company about the making of a call? A. No sir.

"Q. Did you ever hear of the telegram and letter being sent to the International Trust Company informing them that a call was being paid by the stockholders? A. No sir."

Witness further testified that to his knowledge no call upon the stock of the Vaccine Company had ever been made; that he never heard of the making of a call.

Being cross examined by the plaintiff, witness further testified that he had secured a number of subscriptions to the stock of the Vaccine Company, including that of defendant, that he was largely interested in the Company, that he had been a director of the Company and sales manager.

"Q. Mr. Taylor, I ask you whether or not about December, you were not removed from your office as manager of the sales department?"

To which objection was made by the defendant on the ground that it was immaterial whether or not witness was removed from any office in the Vaccine Company. This objection was overruled by the Court, whereupon the defendant was allowed an exception.

"A. I was.

"Q. Did you not feel then that that was a very unjust act on the part of these other gentlemen, and did it not anger you with them?"

To which objection was made by the defendant on the ground that even if the witness had disagreed with associates in the
86 Vaccine Company, it would not show bias against plaintiff, and the only possible reason for such a line of examination was to show bias. This objection the Court overruled, whereupon defendant was allowed an exception.

"A. Yes sir.

"Q. Did you not promptly institute one or more suits against the National Vaccine & Formaldehyde company through Mr. Warner?

To which objection was made upon the same ground. The Court ruled as follows:

"Wherever there is indication of bad faith or bias or prejudice I have been disposed to allow counsel to go into an inquiry. The question raised here depends upon the credibility of this witness, and I feel that it is as much due to him as to all the parties in the case to have the matter brought out."

Whereupon the defendant was allowed an exception.

Witness further testified that he had disagreed with Charles M. Campbell, that naturally he could not feel over generous toward Campbell after the way he had acted, and that he had brought suit against the National Vaccine and Formaldehyde Company.

The defendant offered in evidence acknowledged copies of agreements of settlement between the plaintiff and Charles M. Campbell, set forth hereinabove, Rufus K. Helphenstine, Joseph Schiffman, and C. C. Carlin and Louis C. Barley, the latter three agreements being as follows:

Memorandum of agreement made and entered into this 12th day of December, 1907, by and between the International Trust
87 Company of Maryland, a corporation acting through its attorney, Walter C. Clephane, party of the first part, and Rufus K. Kelphenstine, of the city of Washington in the District of Columbia, party of the second part.

Whereas, the said party of the second part on or about the fifth day of October, 1906, signed a certain agreement in and by which he subscribed for certain capital stock in the National Vaccine & Formaldehyde Company, a corporation organized under the laws of the State of Virginia, to the extent of one hundred (100) shares of the preferred stock of the said company at the rate of ten dollars (\$10.00) per share, making a total liability under said contract of one thousand dollars (\$1,000) and

Whereas, said stock subscription agreement provided upon its face that it might be assigned to any corporation from whom said Vaccine Company might procure a loan, as security for said loan; and

Whereas, said subscription, less ten (10) per centum of the amount thereof, was duly assigned by said Vaccine Company to the party of the first part hereunder as security for a certain loan amounting in all to fifty thousand dollars (\$50,000), obtained by said Vaccine Company from said party of the first part; and

Whereas, said loan has long since matured and is still unpaid, and certain proceedings at law and in equity are now pending against said National Vaccine Formaldehyde Company to realize as much of said loan as can be obtained from the assets of said company, and

88 Whereas, the said Helphenstine has been sued in the Supreme Court of the District of Columbia, in a certain suit at law numbered 49523 based upon his liability for forty per cent. of the amount due under said subscription agreement and has interposed certain pleas and an affidavit of defense in said case; and the

plaintiff has filed a motion for judgment notwithstanding said pleas and affidavit, and a declaration has been prepared against said Helphenstine ready for filing in said court in an action at law based upon his liability for the additional fifty per centum due under said subscription agreement; and

Whereas, it is the desire of both parties hereto to settle said litigation in an amicable manner;

Now therefore this agreement witnesseth that the parties hereto for and in consideration of the sum of one (\$1.00) dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, and in order to compromise and settle the said litigation and all liability arising under said subscription agreement, do hereby mutually covenant and agree as follows:

First. The said party of the second part shall immediately confess judgment in the pending suit aforesaid as well as upon the suit proposed to be brought as aforesaid upon his liability for fifty per centum of the amount of stock subscribed for in said subscription agreement.

89 Second. That the said party of the second part hereby acknowledges that he is justly indebted to the said party of the first part under and by virtue of said subscription agreement in the full sum of Nine hundred (\$900) Dollars with interest as follows: on the sum of One hundred and fifty (\$150) dollars from the 30th day of January, 1907; on the sum of two hundred and fifty (\$250) dollars from the 30th day of April, 1907; on the sum of Two hundred and fifty (\$250) from the 30th day of July, 1907; on the sum of two hundred and fifty dollars (\$250) from the 30th day of October, 1907. Said party of the second part also admits his liability for the costs of said suits.

Third. And in order to wipe out and satisfy his said liability, the said party of the second part agrees to pay on the fifth day of January, 1908 to the said party of the first part, the sum of fifty (\$50) dollars and he also agrees to pay the balance to said party of the first part as rapidly as possible until his liability under this agreement is fully ended and satisfied.

Fourth. And the said party of the first part shall have the right as soon as it shall be convinced that said Helphenstine is not doing the utmost within his power to liquidate his liability as herein admitted, to forthwith place upon record the confession of judgment in said pending suit and to file the other suit at law herein above referred to as well as the confession of judgment hereby agreed to be signed in said last named suit.

90 Fifth. And it is further distinctly understood and agreed that as soon as any amounts which may be realized net to the said party of the first part from the assets of the National Vaccine and Formaldehyde Company and from collections made from the other subscribers to the subscription agreement aforesaid, shall, together with the amount paid by the said Helphenstine under this agreement, equal the sum then due to said Trust Company with interest, by reason of the loan of fifty thousand (\$50,000) dollars herein above recited, then the said Helphenstine is to be forthwith

discharged from paying any further amount under and by virtue of this agreement; but the said Trust Company may conduct the necessary litigation to realize upon said assets, and institute, abandon or compromise any suits or proceedings looking to that end and as to it may seem proper, without consultation with or interference from said Helphenstine.

And it is further understood and agreed, that the obligations assumed hereunder and the rights conferred hereby shall be enforceable and obligatory upon and enure to the benefit of the heirs, executors, and administrators of the party of the second part, and the successors of the party of the first part.

In testimony whereof, the said party of the first part has executed these presents through its attorney, the said Walter C. Clephane, and the said party of the second part has likewise executed these presents in his own proper person at the city of Washington, in the District of Columbia, on the day and year first hereinabove mentioned.

91 (Signed) INTERNATIONAL TRUST CO. OF MD.
By WALTER C. CLEPHANE.
RUFUS K. HELPHENSTINE.

Memorandum of agreement made and entered into this — day of — 190-, by and between the International Trust Company of Maryland, a corporation acting through its attorney, Walter C. Clephane, party of the first part, and Joseph Schiffman, of the City of Washington in the District of Columbia, party of the second part.

Whereas, the said party of the second part on or about the fifth day of October, 1903, signed a certain agreement in and by which he subscribed for certain capital stock in the National Vaccine and Formaldehyde Company, a corporation organized under the laws of the State of Virginia, to the extent of five hundred (500) shares of the preferred stock of the said company at the rate of ten dollars (\$10) per share, making a total liability under said contract of five thousand (\$5,000) dollars and

Whereas, said stock subscription agreement provided upon its face that it might be assigned to any corporation from whom said Vaccine Company might procure a loan, as security for said loan; and

92 Whereas, said subscription, less ten (10) per centum of the amount thereof, was duly assigned by said Vaccine Company to the party of the first part hereunder as security for a certain loan amounting in all to fifty thousand (\$50,000) dollars, obtained by said Vaccine Company from said party of the first part; and

Whereas, said loan has long since matured and is still unpaid, and certain proceedings at law and in equity are now pending against said National Vaccine and Formaldehyde Company to realize as much of said loan as can be obtained from the assets of said Company, and

Whereas a judgment has been recovered against the said Schiff-

man in the Supreme Court of the District of Columbia in a certain suit at law numbered 49520, based upon his liability for forty per cent. of the amount due under said subscription agreement; and a declaration has been prepared against said Schiffman ready for filing in said court in an action at law based upon his liability for the additional fifty per cent. due under said subscription agreement; and

Whereas, it is the desire of both parties hereto to settle such litigation in an amicable manner;

Now therefore this agreement witnesseth, that the parties hereto for and in consideration of the sum of One (\$1.00) dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, and in order to compromise and settle the said litigation and all liability arising under said subscription agreement, do hereby mutually covenant and agree as follows:

First. The said Schiffman shall pay contemporaneously with the execution of these presents, the amount of the judgment aforesaid, to wit, the sum of Two Thousand (\$2000.00) dollars, with interest as follows; upon the sum of seven hundred and fifty (\$750) dollars from the thirtieth day of January, 1907, and upon the sum of twelve hundred and fifty (\$1250) dollars from the thirtieth day of April, 1907; also the costs of said suit amounting to —, and said judgment immediately upon payment thereof, shall forthwith be entered satisfied in the clerk's office of said court.

Second. The said Schiffman admits his further liability to the said Trust Company based upon the said agreement for the sum of twenty-five hundred (\$2500) dollars, with interest as follows; upon the sum of twelve hundred and fifty (\$1250) dollars from the thirtieth day of July, 1907, and upon the sum of twelve hundred and fifty (\$1250) dollars, from the thirtieth day of October, 1907. Said liability of twenty-five hundred (\$2500) dollars, with interest as aforesaid, is to be paid as follows; a. Five hundred (\$500) dollars on May 1st, 1908, together with the entire interest due to the date last aforesaid upon the said sum of twenty-five hundred (\$2500) dollars. b. Five hundred (\$500) dollars on September 1st, 1908, together with the interest to the date last aforesaid upon the two thousand (\$2000) dollars then remaining unpaid. c. Five hundred (\$500) dollars on January 1st, 1909, together with the interest to the date last aforesaid upon the fifteen hundred (\$1500) dollars then remaining unpaid. d. Five hundred (\$500) dollars on April 1st, 1909, together with the interest to the date last aforesaid upon the one thousand (\$1000) dollars then remaining unpaid. e. Five hundred (\$500) dollars on July 1st, 1909, together with the interest to the date last aforesaid upon the amount then remaining unpaid.

The said Schiffman is to have the privilege to anticipate any or all payments of principal or interest hereinabove provided for, and in the event any payment or payments shall be anticipated by him the interest shall be abated for the period so anticipated.

Third. In order to secure the said Trust Company for the prompt and punctual payments hereinabove provided for, the said Schiffman shall execute and deliver to the said Trust Company, or its attorney,

contemporaneously with the execution of these presents a confession of judgment in a suit the declaration in which has been prepared based upon the liability of the said Schiffman in the sum of twenty-five hundred (\$2500) dollars with interest as aforesaid; and in case the said Schiffman should at any time default in the prompt payment of any installment of principal or interest hereinabove provided for the said Trust Company shall have the right to forthwith file said declaration and confession of judgment without further notice to the said Schiffman, in which event the whole amount of twenty-five hundred (\$2500) dollars with interest as aforesaid, together with the costs of said suit shall immediately become
95 due and payable, but until default in any said payments said confession of judgment shall be held by said Trust Company and not placed upon record.

Fourth. The said payments hereinabove provided for with the exception of the payment to be made in satisfaction of the judgment aforesaid are to be made at the office of the International Trust Company of Maryland in the City of Baltimore, without any demand or notice to the said Schiffman.

Fifth. And it is distinctly hereby understood and agreed that as soon as any amounts which may be realized net by said Trust Company from the assets of the National Vaccine and Formaldehyde Company and from collections made from the other subscribers to the subscription agreement aforesaid, shall, together with the amount paid by said Schiffman under this agreement, equal the sum then due to the said Trust Company with interest, by reason of the loan of fifty thousand (\$50,000) dollars hereinabove recited, then the said Schiffman is to be forthwith discharged from paying any further amount under and by virtue of this agreement; but it is distinctly understood and agreed that the said Trust Company by the use of the word "net" in this paragraph shall be entitled to collect from the assets of the National Vaccine and Formaldehyde Company and from said underwriters a sufficient sum over and above the amount due and unpaid on said fifty thousand (\$50,000) loan as aforesaid, such reasonable and necessary amounts as it may have expended or may be obliged to expend in the litigation resulting
96 from the non payment of said loan, the liability of the said Schiffman however in no event to exceed the amount of the judgment hereinabove recited together with the sum of twenty-five hundred (\$2500) dollars with interest as aforesaid, and costs of such suit or suits as may be necessary to collect said sum of twenty-five hundred (\$2500) dollars with interest.

And it is further understood and agreed that said Trust Company may conduct the said necessary litigation to realize upon the said assets, and institute, abandon or compromise any suits or proceedings against said company, or against the subscribers to the said subscription agreement, with the object of realizing upon the amount of its loan as aforesaid, as to it may seem proper, without consultation with or interference from said Schiffman.

And it is further understood and agreed that the obligations assumed hereunder and the rights conferred hereby shall be enforceable

and obligatory upon and enure to the benefit of the heirs, executors, and administrators of the said Schiffman and the successors of the said Trust Company.

In testimony whereof, the said party of the first part has executed these presents through its attorney, the said Walter C. Clephane, and the said party of the second part has likewise executed these presents in his own proper person at the City of Washington, in the District of Columbia, on the day and year first hereinabove
97 mentioned.

INTERNATIONAL TRUST COMPANY
OF MARYLAND,

By ———.

This agreement, made this 30th day of October, 1907, by and between the International Trust Company of Maryland, party of the first part, a corporation, and Louis C. Barley and C. C. Carlin, of Alexandria, Virginia, parties of the second part.

The International Trust Company of Maryland, as assignee of the National Vaccine & Formaldehyde Company, a Virginia corporation, holds the subscription agreement of the parties of the second part to the preferred stock of the said Vaccine Company, in the amount of one thousand dollars each, of which total subscription only nine-tenths has been assigned by the Vaccine Company to the International Trust Company, as security for certain notes.

The International Trust Company of Maryland contends that there is now due and owing to it as assignee of said subscription paper from each of the parties of the second part the sum of nine hundred dollars and each of the parties of the second part contend that there is only due and owing from them on such subscription seven hundred and fifty dollars each.

It is the purpose and desire of the parties to settle the dispute between them above stated, and it is agreed that the said
98 Louis C. Barley and C. C. Carlin shall each pay and do hereby pay to the International Trust Company of Maryland, the sum of eight hundred dollars, the receipt whereof is hereby acknowledged, with the understanding that the Trust Company acquits and exonerates them from any further payment to it for and on account of said subscription agreement, but with the express understanding and proviso that the said Trust Company does not undertake to release or discharge the said parties of the second part, or either of them, from any obligation which they or either of them may have unto the National Vaccine & Formaldehyde Company on account of said stock subscription; the sole object and purpose of this paper being to have the sum of sixteen hundred dollars paid to the Trust Company as the full amount due to it alone for and on account of the matters above stated.

It is further understood and agreed that as the Trust Company also holds as collateral to the notes above mentioned the subscription of other parties to the stock of said Vaccine Company and is proceeding to enforce its claims against said other subscribers, nothing in this agreement shall in any way affect or prejudice the claim of the said Trust Company against said other subscribers and in the

event that by any possible construction the effect of this paper should be to in any way interfere with the full rights and contentions of the Trust Company in respect thereto, then the said Trust

99 Company shall be at liberty to return the said sixteen hundred dollars and have a cancellation of this paper.

In witness whereof the said International Trust Company of Maryland has caused its name to be signed hereto by ———, its President, and its corporate seal to be hereto affixed attested by its Secretary, and the parties of the second part have hereunto signed their names and affixed their seals, the day and year first above written.

INTERNATIONAL TRUST COMPANY
OF MARYLAND,

By ———, *President*.

Test:

———, *Secretary*.

(Signed)

C. C. CARLIN. [SEAL.]
LOUIS C. BARLEY. [SEAL.]

And the agreement between plaintiff and Charles E. Wood was offered as being of the same tenor as the Charles M. Campbell agreement hereinabove, except that said agreement does not contain the 9th section appearing in said Campbell agreement.

All the several agreements were offered to show that plaintiff, by means of the several settlements in conjunction with cash payments received had received and secured to be paid by the several undertakings a sum in excess of its total claim. The agreement between plaintiff and R. K. Helphinstine was also offered as tending to show bias on the part of said Helphinstine as a witness for the plaintiff. To the introduction of the several agreements for the purposes stated, plaintiff objected. This objection the Court sustained, where-
100 upon the defendant was allowed an exception.

Whereupon defendant offered in evidence the certificates of stock of the National Vaccine & Formaldehyde Company for \$60,000 preferred stock, the total issue of such stock of said company, and \$60,000 of Common stock, the same issued by the Vaccine Company to W. D. Focke, being the stock issued to plaintiff as collateral.

Thereupon defendant rested.

The defendant offered the following prayers, which were refused by the Court, and to the refusal of each of which the defendant excepted, and was as to each prayer so refused then and there allowed an exception:

1.

If the jury shall find from the evidence that no call or its equivalent was made by the National Vaccine and Formaldehyde Company for the first ten per cent. of the stock subscription, and that there was no waiver of the first call by the defendant Howard, or anyone representing him, and that neither the defendant nor any one representing him made or ratified any representations to the

plaintiff regarding the making or paying of the said first call, then their verdict shall be for the defendant.

2.

If the jury shall find from the evidence that a representation or representations were made to the International Trust Company of Maryland by officers of the Vaccine Company, or any other person or persons, other than the defendant, or one authorized to act for
101 him, that the first call had been paid, and that upon this representation said Trust Company acted in forwarding money to said Vaccine Company, and that such representation or representations were false, no such call having in fact been made and paid, their verdict shall be for the defendant.

3.

If the jury shall find from the evidence that the defendant never received any notice of the first call for ten per cent. of the preferred capital stock of the Vaccine Company, whether said call was made or not, and never waived notice of such call, the verdict shall be for the defendant.

5.

If the jury shall find from the evidence that Taylor as representing the defendant did neither vote for, nor ratify, nor know of the letter of the National Vaccine and Formaldehyde Company to the International Trust Company dated October 27th, 1906, representing that a call had been made, and that no actual call was ever made by the National Vaccine and Formaldehyde Company, the verdict shall be for the defendant.

6.

If the jury find from the evidence that the Board of Directors of the National Vaccine and Formaldehyde Company meeting as a Board of Directors never made any call upon the stock of the corporation, they are to find as a fact that no call upon the stock of the corporation was made by the corporation.

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7.

If the jury find from the evidence that the International Trust Company of Maryland charged the National Vaccine and Formaldehyde Company interest upon a loan of Fifty Thousand dollars from the 22nd day of October, 1906, and accepted an assignment on that day of the stock subscription agreement of the said Vaccine Company, they shall disregard so far as the defendant is concerned all representations made by the National Vaccine and Formaldehyde Company to the Trust Company, or by other persons to the Trust Company, after said 22nd day of October 1906, unless they shall find from the evidence that said representations were authorized or ratified by said Howard.

8.

If the jury shall find from the evidence that the defendant held no stock in the National Vaccine and Formaldehyde Company, and

that no stock in said Company stood in his name upon the corporate books of said company, they shall disregard all evidence tending to show that the defendant was represented in any meeting of the stockholders of said company by proxy.

9.

If the jury shall find from the evidence that the letter of October 27th written in the name of the National Vaccine and Formaldehyde Company to the International Trust Company of Maryland was signed for said Vaccine Company by persons not at the time of signing the duly elected officers of the Corporation, and that the
103 defendant did not authorize or ratify the signing of the corporate name by such persons, the jury shall disregard said letter so far as the defendant is concerned.

11.

If the jury shall find from the evidence that no call or assessment was made on the defendant by the National Vaccine and Formaldehyde Company prior to or on the 22nd day of October, 1906, for the payment of the first ten per cent. of the capital stock alleged to have been subscribed for by him, their verdict shall be for the defendant.

Thereupon the court charged the jury as follows:

Gentlemen of the jury, the trial in which you have been engaged covers five separate and distinct suits, two against the defendant George E. Howard, two against the defendant Dr. Harrison Crook, and one against the defendant Henry M. Baker. For the purposes of this trial these cases were consolidated under the order of the court in order that they might be tried at the same time and by the same jury. In so far as there is any essential distinction between these several cases I will endeavor to point out such distinction in the course of my instructions, so that, in considering the testimony and applying thereto the instructions of the Court as to the law, you may be enabled to arrive at a verdict in each of these cases precisely as if each case had been tried by itself.

In the first place, the plaintiff, the International Trust Company of Baltimore, Maryland, brought its suit against the defend-
104 ant George E. Howard, No. 49525, to recover the sum of \$2,000 with interest on \$750 from the 30th day of January, 1907, and upon \$1,250 from the 30th day of April, 1907, on a certain stock subscription contract which it claimed he made and hypothecated, or pledged, to it, the plaintiff, as security for the repayment to the plaintiff of some \$50,000 loaned, or agreed to be loaned, by the plaintiff, the International Trust Company of Maryland, to the National Vaccine and Formaldehyde Company, a corporation, to which stock subscription I will refer more specifically further on. Later on the plaintiff brought suit against the same defendant, George E. Howard, No. 50111, to recover \$2,500, with interest on \$1,250 from the 30th day of July, 1907, and upon \$1,250 from the 30th day of September, 1907, on an alleged like stock subscription contract which it claimed he made and pledged to the

plaintiff as security for the repayment to the plaintiff of this \$50,000 loaned by it to the Vaccine Company.

The plaintiff also brought its suit, No. 49526, against the defendant Harrison Cook, to recover the sum of \$2,400, with interest on \$900 from the 30th day of January, 1907, and upon \$1,500 from the 30th day of April, 1907, and later brought a second suit against Dr. Crook, No. 50109, to recover the sum of \$3,000, with interest on \$1,500 from the 30th day of July, 1907, and on \$1,500 from the 30th day of October, 1907, those suits being based upon an alleged like subscription for a purpose such as I have already described.

Again the plaintiff filed its suit against the defendant Henry M. Baker, based upon an alleged subscription and for a like purpose as I have already referred to, to recover the sum of \$400, with interest on \$150 from the 30th day of January, 1907, and upon the sum of \$250 from the 30th day of April, 1907.

So that, in applying to the testimony in these cases the instructions of the Court as to the law applicable thereto, you will bear in mind that it will be your duty to render a separate and distinct verdict in each of the 5 cases, the first two of which cases, as I have already indicated, are against the defendant Howard, the next 2 cases against the defendant Crook, and the last one against the defendant Baker. These cases, and each of them, involve the determination of two general propositions, first, whether the stock subscription contract sued on is the identical contract signed by each of the several defendants, and secondly, whether the first installment, the 10 per cent. installment, to the stock subscription of each of the defendants was called, or was agreed to be considered and treated as though formally called. The burden of proof, gentlemen, is upon the plaintiff to establish both of these propositions by the preponderance or weight of the evidence. The first question, then, for you to determine, is whether the subscription contract here sued on is the contract signed by these several defendants. If you are satisfied from the evidence that it is not, then you need not go any further, but return a verdict for each of the defendants. If, on the other hand, you are satisfied from the evidence, and so find, that this is the contract that each of the defendants signed, then you will next

consider the second proposition presented for your consideration, the contention of the defendants being, you understand, that even if this is the contract signed by them, still the plaintiff is not entitled to a verdict because the first call for stock subscriptions was never made by the Vaccine Company.

This at once involves the consideration of the proxies alleged to have been executed and delivered by the several defendants, that of Mr. Howard to Mr. Taylor, and those of Dr. Crook and Mr. Baker to Mr. Helphenstine, by the express terms of which proxies they are designated as the duly authorized agents of the several defendants, to vote the stock of these several defendants at any and all stockholders' meetings of the Vaccine Company, and it also involves the consideration of what was thereafter done at such stockholders' meetings at which the defendants' agents, if you should find that they were duly appointed as the agents, through the medium of

these proxies, were present and consented thereto. It also involves the consideration of the testimony as to the alleged understanding between the defendants Dr. Crook and Mr. Howard and the Vaccine Company, that each of these gentlemen were not to be called upon to pay anything on account of these stock subscriptions, but that the company was to pay the same for them; or, in other words, whatever obligations they incurred by reason of the signing of this stock, so far as these calls were concerned, they were not expected to furnish any money.

Now, gentlemen, if you should find both of these propositions in favor of the plaintiff, that is, that these several defendants signed the subscriptions sued on; secondly, that a call, or its equivalent, was made upon the several defendants, for the first instalment of 10 per cent. of their respective subscriptions, that is to say, that the payment of the first instalment of 10 per cent. upon the stock subscriptions was either called, or the formal call was waived by each of the defendants by agreeing that such call should be treated and considered as though the same was formally made, and also that these several stock subscriptions, by and with the authority of the defendants, and of each of them, were assigned and pledged to the plaintiff as security for the \$50,000 borrowed by the Vaccine Company from the plaintiff, and that the plaintiff loaned this money to the Vaccine Company upon the faith and credit of the stock subscriptions of the defendants and other stockholders, then, upon the establishment of those propositions, it will be your duty to return a verdict against each of these defendants or against such of them as to whom you find these propositions established for the full amount, together with the interest as claimed in the declaration.

You will bear in mind, gentlemen, that each of these defendants, Howard, Crook and Baker, while admitting the genuineness of his signature attached to the alleged subscription agreement sued on, denies that such subscription agreement is the identical contract or agreement signed by him, but that there has been a certain material alteration or change made in said paper writing since he so attached his signature. Therefore, if you should find from the evidence, for instance, in the case of Mr. Howard, to illustrate, that the paper writing put in evidence as the stock subscription agreement was not the paper writing which was presented for his signature and which he did sign, but that the paper which he did sign was some different paper writing, then your verdict shall be for the defendant, and that would be equally true as to Dr. Crook. As far as Mr. Baker is concerned, he admits that he signed his name to the subscription paper for \$1,000, for 20 shares of stock, but he says that thereafter it was changed from 20 shares of stock of the par value of \$50, without his knowledge or consent, to 100 shares, and of the par value of \$10 per share instead of \$50, but he does not deny that he was, under the terms of his subscription, to pay \$1000 for 20 shares of stock of the par value of \$50 per share, that is, that those were the terms of his subscription; but he denies his liability for the reasons already stated.

So that, unless you believe from the preponderance of the evidence that the paper writing or contract sued on in this case was the identical subscription contract which was signed by the several defendants, then your verdict must be for each of the defendants, or for such of them as you may find did not sign the identical paper writing or contract sued on in these several causes, that is, gentlemen, you must believe from the preponderance of the evidence that the paper writing or contract sued on in these causes, contains the identical contract signed by the defendants and each of them. Therefore I have granted the following instruction, as a part of the instruction of the Court.

“The jury are therefore instructed, as a matter of law, that if they find from the evidence that the papers signed by the defendant Harrison Crook, with the number of shares set opposite his name, did not have attached to them the pages containing the provision in reference to any right to assign and to secure a loan, as those provisions appear by the contracts of subscription offered in evidence in the cases against him, and if you further find that the said defendant merely subscribed for the stock set opposite his name on the last page of said contract of subscription, offered in evidence, and did not subscribe for said stock with a provision in reference to the right to assign and secure a loan, and that the said pages containing said provision were subsequently fraudulently inserted contrary to his actual subscription, and without his authority or consent, then your verdict should be for the said defendant on all the counts of the declarations filed in the two cases of the International Trust Company of Maryland against Harrison Crook now before you.”

This would apply equally to Mr. Howard. To determine, gentlemen, whether the paper writing or contract sued on embodies the same identical contract as that entered into by the defendants, and each of them, you have the right to take into consideration all the facts and circumstances of this case as disclosed by the evidence, including the physical condition of the paper writing or contract, offered in evidence by the plaintiff. That is, you have a right to take into consideration the fact that this paper writing is composed of 3 typewritten pages, followed by a 4th page, upon the latter page of which appear the signatures of the several defendants, and all bound, or held together, by a metallic fastener in such manner as to be susceptible of being separated so as to permit the substitution of one or more typewritten pages in lieu of those accompanying the page upon which the defendants admitted signatures are found. This physical condition, and the possibility of such separation and substitution, present for your consideration the question of whether, as a matter of fact—not as a matter of speculation, but as a matter of fact,—viewed in the light of all of the facts and circumstances of these cases as disclosed by the evidence, such separation and substitution as claimed by the defendants have, in fact, occurred. The fact that the single sheet to which the defendants attached their signatures was bound together with those in this fashion, that is by metallic fasteners, and that they were therefore

susceptible of being readily unbound, and one or more sheets being withdrawn therefrom and others substituted, was, however, a physical condition as open to the observation and knowledge of the defendants as of anybody else at the time when the paper writing was signed, and in the absence of proof to the contrary you have a right to assume that they knew, or at least ought to have known, that they were so bound together, and that it was possible for other sheets to be substituted for those attached to the one upon which they wrote their signatures. But you must not assume, simply because it was possible to change this contract in this fashion, that such substitution and change in the contract was, in fact, made. Before you can find that any such change was made, you must be satisfied of that fact from the evidence and all the facts and circumstances in the cases, and not merely because such a thing was possible.

111 The burden, as I have said, is upon the plaintiff to prove that this paper writing or contract as a whole is the very paper writing or contract that was signed by the several defendants, and as these defendants deny that it is, as a whole, the very paper writing that they severally signed, it is for you to determine the weight or preponderance of the evidence upon this proposition. and if you are satisfied that the evidence in favor of the proposition that this is the very contract signed by each of them outweighs the evidence against that proposition, then the plaintiff has made out his case in respect to this being the original contract signed by the defendants; but if, on the other hand, the weight or preponderance of the evidence in the case does not establish such proposition, then you need not go further, but may return a verdict for the defendants.

Again, gentlemen, even though you may be satisfied, or believe, that the defendants signed the paper writing or contract upon which this suit was brought, and also, by their respective agents or proxies, voted for or knew of the letter of October 27, sent by the Vaccine Company to the plaintiff, unless you further believe that the plaintiff relied, either wholly or in part, upon the representations contained in such letter of October 27th, 1906, or unless you believe that at said meeting of October 27, 1906, it was agreed, with the knowledge and acquiescence of such of the defendants as it is alleged were represented by proxies, that the call should be considered as made, or unless it was understood between the defendants and the Vaccine

Company that the said defendants Crook and Howard should
112 not be called upon, but that the same should be paid by the Company, then your verdict must be for the defendants.

Under the conditions of these stock subscriptions, before any subscriber to stock, including these defendants and each of them, could be held legally bound to pay, he was entitled to a notice or a call that the first payment was needed, and whenever that call was made, then the liability of such stockholder, including the liability of each of these defendants, who signed this contract, would become fixed, after the call was made. It then became what we call in law a chose in action, that is, an obligation upon which a right to sue arose, because under the terms of this stock subscription, the several subscribers promised to pay the first instalment of ten per cent. whenever a call

or demand was made therefor, so that before a suit could be prosecuted upon such subscriptions, such call, or its equivalent had to be made, but whenever it was made, then the liability arose.

You are therefore further instructed, upon this proposition, that, as a matter of law, in order to hold the defendant Harrison Crook on the stock subscription contract offered in evidence, you must find from all the evidence that a call, or its equivalent, had been made on the said defendant Harrison Crook, by the National Vaccine and Formaldehyde Company, for the payment of the first ten per cent. of the amount of stock subscribed for by him, and that the said defendant is not bound by anything that was done at the meeting held on the 30th day of October, 1906, if the jury find that he was not present at that time either in person or by proxy, unless you further

113 find that the defendant Crook signed the identical subscription contract sued on, or unless you find that at the time he signed such contract, should you find he did sign the same, it was understood and agreed between the company and said defendant that he would not be called upon to pay anything on account of his stock subscription, but that the same would be taken care of by the company; and this applies, in substance, to Mr. Howard as well.

Now, gentlemen, it is a well recognized rule in business, as well as in law, that what a man may lawfully do in person, he may likewise lawfully do through his duly authorized agent. So you will understand that if these several defendants gave to Mr. Taylor their proxies, the legal effect of such proxies was to appoint the person named therein as the lawfully authorized agent of such defendant giving the proxy, to act for him as such agent at any and all subsequent stockholders' meetings to the full extent named in the proxy, and that, too, as fully and completely as such defendant could have acted for himself had he been personally present at such meeting or meetings. You will understand, of course, that in order for a call to be binding upon a stockholder, he must have had a proper notice of such call, that is, such call as the law requires, or such manner of call as he may agree to, either in person or by proxy; or he may, either in person or by his duly appointed proxy, waive such call altogether, so that any agreement made, or understanding had with the stockholders, including these defendants, to waive such call, and consider and treat the same as though it had been formally made at

114 the meeting of October 27, 1906, would be binding upon each and all of the stockholders personally at such meeting, either in person or by proxy, but if you should find from the evidence that any one of these defendants was not present, either in person or by proxy, at that meeting, it will be your duty to return a verdict for such defendant.

Again, the requirement of the law that the first call for stock subscriptions must be made in the manner and for the payment designated by the statutes, is such a requirement as the stockholders themselves might waive; and having once waived such call, they would be as much bound in law to make such first payment as if the call had been made in manner and form as indicated by the statutes. So that you may find that the defendants signed the contract sued on, but before the plaintiff is entitled to recover, he must

further satisfy you that a first call for stock subscriptions was made, or that it was considered and treated as made by agreement of all the stockholders, including the defendants, acting through their respective proxies. If you are, therefore, satisfied from the preponderance of the evidence, that is, if you are so satisfied of these matters that I have just indicated, then the plaintiff is entitled to recover against the defendants, and each of them, without regard to whether, as a matter of fact, said call had actually been paid at the moment that said officers informed the plaintiff, the Trust Company, that such first payment had been made, and also without regard to whether the defendants knew that the officers of the company had notified the plaintiff that the call had been made.

115 Therefore, if you believe from the evidence that the defendants signed the stock subscription agreement offered in evidence and purporting to bear their respective signatures; that at a stockholders' meeting held October 25, 1906, Howard was represented by his proxy, Benjamin E. Taylor, and the other two defendants by their proxy, Mr. Helphenstine, and at such meeting a resolution was passed directing the president and treasurer to immediately make the first call of ten per cent. upon the subscribers, under the subscription contract, and that these gentlemen had knowledge thereof and acquiesced therein; and that at a stockholders' meeting held October 27, 1906, the several defendants were likewise represented by their proxies, and a resolution was adopted, with the knowledge and acquiescence of said proxies, authorizing the writing of the letter to the plaintiff dated October 27, and offered in evidence, then the plaintiff is entitled to recover the full amount claimed in its declarations. In other words, gentlemen, it is wholly immaterial in this case whether the call was made or not, if you should be satisfied that it was agreed and understood at the meeting of October 27th, that the call should be treated as made, and that the plaintiff be notified that it was made, and that the plaintiff was so notified and relied thereon, providing you further find that the several defendants, as represented by their proxies, were present at the meeting, had knowledge of what was done, and acquiesced therein, in either of these aspects the defendant could not be heard to deny their liability because of the failure to make the formal call,

for the reason that, in the first aspect, they would have waived
116 or dispensed with the necessity for the call, and in the second aspect, if these defendants were present through their proxies at that meeting and had knowledge that the Vaccine Company was about to secure a loan upon the representation that the first call for stock subscriptions had been in fact made, and that these proxies knew that the plaintiff was relying upon the stock subscriptions for the repayment of the loan, then these several defendants would not be heard to say that the call had not been made, but they would be severally liable so far as the call is concerned, without regard to whether the call was made or not. But if, on the other hand, you should find that these gentlemen holding these proxies did not know that the Vaccine Company, through its representatives, was about to secure this loan by making the representation to the plaintiff that the first call had actually been made, and you also find that they

did not know that the plaintiff was relying upon such stock subscriptions for repayment of the loan, then said defendants would not be liable, and your verdict should be for the defendants in that view of the case, and your verdict also, gentlemen, must be for the defendants, if you should find that they did not sign the contract sued upon in this case, as I have already suggested.

I believe that covers all the propositions of law that occur to me or that I have been asked to give to the jury. Now, gentlemen, in conclusion, I want to say to you that when you retire to your jury room it will be your duty—and I am sure you will discharge it—to carefully weigh and consider all the facts, all of the testimony and
 117 all of the attending circumstances, that have been submitted for your consideration in the course of this trial; and in so considering it, it is your primary duty, and naturally you will prefer to do so, to proceed upon the assumption that these witnesses while testifying here before you intended to tell the truth. The mere fact that there is a conflict of evidence is not necessarily evidence of the fact that somebody has sworn falsely. Men differ in their recollection of things or occurrences, and may be entirely honest in their differences, and yet widely apart in their recollection or observation of what did actually occur. But if you cannot reconcile the evidence on that hypothesis, then you have the right to reach the conclusion that these differences grew out of a wilful misrepresentation of facts, and if you believe that any witness who has been before you has knowingly falsified the truth, you have a right to reject his entire testimony; or you may reject so much of it as you feel it is your duty to do—that you are bound to do—in the light of the testimony of the other witnesses, or, in other words, in the light of all the testimony in the case.

In determining whether a given fact is true or not, you are to be governed simply by the number of witnesses who swear either one way or the other. The testimony of one witness may so appeal to you that you would accept his statement, under all the circumstances, either from the standpoint of its reasonableness, or from the standpoint of his clear knowledge of what he is talking about, his disposition to frankly speak what he knows, so that you may be disposed to
 118 prefer to accept his statement over that of one or more who testify against him, and yet at the same time, we cannot ignore the fact, when we come to pass upon whether a certain thing is true or not, that those who swear a certain thing is true outnumber those who swear that the thing is the other way. So that you will give due consideration to that fact, and only due consideration to any disparity in the number of witnesses who have been called to the stand in this case to testify upon any given point. So you must thus candidly, cautiously, and honestly proceed to inquire into what the testimony is, and its bearing upon the two general propositions that I tell you are involved in the case.

When you go to the jury room some of you may probably have forgotten what was said upon a given point. Others of you may remember distinctly just what was said. Therefore it is your duty to listen to each other, and give proper consideration to the recollection

of your fellow jurors, so that in the end you may arrive at the very truth of this matter, and return a verdict here in accordance with the facts and with the truth of the several cases.

It is hardly necessary, I take it, that I should say to you that you must not be influenced in the slightest degree in this case by the fact that the plaintiff, the International Trust Company of Baltimore, Maryland, is a corporation, and a foreign corporation, that is, a corporation organized and doing business outside of the jurisdiction of this district, and that the several defendants are individuals and citizens of your own city. To allow either consideration to have the slightest influence in determining how you will decide this case,

119 would be a violation, and an inexcusable violation, of your oaths. Nor, perhaps, is it necessary that I should say to you that you are not concerned as to who got this money which was paid out by the Trust Company.

It does not make any difference to you whether or not a dollar of it went into the pockets of the defendants, or of any one of them. It does not make any difference to the plaintiff who got the money: it is not to be in any way prejudiced by that fact. I only speak of this because it might occur to some one of you that the several defendants did not get any of this money; therefore such defendant ought not to be called upon to pay it back. But you must bear in mind that this is not that kind of a case. Under the several stock subscriptions involved in this controversy, these several defendants were not to get any of the money under the stock subscriptions. They were not to get any of the money, if they made such subscriptions, from the Trust Company. The money was to go into the treasury of the Vaccine Company. Therefore, you will leave out of consideration the question as to who got this money.

Now, gentlemen, when you retire to the jury room, you will be handed the declarations in these cases. The declaration is the paper filed by the plaintiff in the case setting forth his cause of action, and these declarations will be handed you by the clerk to take with you to the jury room, and when you have reached a verdict and have returned to the Court room, you will report, through which ever of your number may be your foreman, your verdict in each case, two

120 cases, as you understand, against Dr. Crook, two cases against Mr. Howard, and one against Mr. Baker. If your verdict should be for the defendants, or any one of them, or more, in any one or more of these cases, your verdict will simply be "That the jury find for the defendant in the case;" or if it shall be for the plaintiff, then your verdict will be for the plaintiff in that particular case for the amount of money claimed in the declaration itself, together with interest as therein claimed.

Mr. CLEPHANE: There are three points I would like to call your Honor's attention to. First, I desire to except to so much of the charge as embodies the prayer granted to Dr. Crook to which I filed exceptions this morning. Also to so much of the Charge as stated that the burden of proof is upon the plaintiff to prove, as a whole, that the paper writing is the identical paper writing. And, thirdly, your Honor used an expression here which I think probably you

did not mean to be understood in quite the way it was stated. It was this: "If you find that the paper writing was not the identical paper, which the defendants signed, then your verdict must be for the defendants." It might be that the jury would receive the impression from that that an immaterial change, as the number of shares of stock, or the par value, would be such a change as would come within that instruction.

The COURT: On the contrary, it would not be such a change as would affect the validity of the contract. I do not remember using that "as a whole." The burden of proof is upon the plaintiff to prove that the contracts sued upon were executed by these several defendants, is what I meant to say.

121 Mr. LAMBERT: May it please the Court, I wish to except to such instructions as I submitted this morning and your Honor refused, and to a part of your Honor's charge which stated that a direct call was not absolutely necessary. Then your Honor speaks in the charge of a call entirely in reference to the meeting of October 27. There was evidence here, in connection with the call proposition, about October 30th, and your Honor will recollect that all of these subsequent calls ran from the 30th day of October—30th day of January, 30th day of April; these subsequent letters which were received, and I think that is something the jury should have in your charge in connection with the meeting of October 27th. So far as Dr. Crook was concerned, he was not present at the meeting of October 30th, either in person or by proxy, and all of these notices that were put in were of a call having been made October 30th, January 30th, and so forth. I do not think it ought to be limited entirely to the meeting of October 27th. Your Honor will remember those circulars all four date from the 30th of October. The contract, or agreement, says three months from the time the call was made, and 3 months after that, and so on. They all date from October 30th. Dr. Crook was not present on October 30th.

The COURT: No, I do not think there is any claim that the Doctor was present at that meeting at all.

Mr. CLEPHANE: Not the slightest.

The COURT: And I have said that repeatedly in the presence of the jury. Bear in mind, gentlemen, in considering the testimony in this case, that it is admitted that Dr. Crook was not present at any conference or meeting held by the stockholders of the Vaccine Company on the 30th day of October, 1906.

122 Mr. LAMBERT: And if that is the time that a call is dated from, he would not be bound.

The COURT: No, he would not be bound by any call made at that time.

Mr. LAMBERT: And there is one other suggestion. Your Honor said if they had made the loan on the faith of the letter which was sent on October 27, leaving out of consideration the fact that they had already accepted the notes and made the loan, so far as the \$22,000 was concerned, on October 22.

Mr. BAKER: I wish to take an exception to that part of your rul-

ing in regard to the change which was made in the number of shares, to that not being an essential change.

The COURT: I think that covers everything.

Mr. WARNER: The same exception applies to Mr. Howard as to the meeting of October 30th?

The COURT: Yes.

Mr. CLEPHANE: I do not think there is any evidence that Mr. Howard was present at such meeting, either in person or by proxy.

(The jury thereupon retired to consider of their verdict.)

And the defendant prays the Justice presiding at the trial to sign and seal this, his bill of exceptions, which is accordingly done now for then this 22d day of May, A. D., 1908.

THOS. H. ANDERSON, *Justice*. [SEAL.]

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Memorandum.

May 25, 1908.—Time to file record in Court of Appeals extended to, and including, June 15th, 1908.

Directions to Clerk for Preparation of Transcript of Record.

Filed May 23, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50111.

INTERNATIONAL TRUST COMPANY OF MARYLAND

vs.

GEORGE E. HOWARD.

John R. Young, Esq., Clerk:

Please include in the Transcript of Record for the Court of Appeals in the above entitled cause, the following pleadings:

1. Plaintiff's declaration, etc.
2. Amendment to declaration.
3. Pleas and affidavits of defendant.
4. Plaintiff's joinder of issue.
5. Memorandum of verdict for plaintiff.
6. Judgment.
7. Appeal order.

8. Citation.

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9. Memorandum of appeal bond.

10. Bill of Exceptions and order thereon.

B. H. WARNER, JR.,
Attorney for Defendant.

Stipulation.

Filed June 10, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49525.

INTERNATIONAL TRUST COMPANY OF MARYLAND

vs.

GEORGE E. HOWARD.

Whereas, the foregoing case was consolidated with the case of the International Trust Company of Maryland *vs.* George E. Howard, At Law No. 50111 for the purposes of trial in the Supreme Court of the District of Columbia because the issues involved in the two cases were the same; and

Whereas, the said cases were tried and verdicts rendered therein at one and the same time; and

Whereas, the evidence in the two cases was the same; and the objections, motions, and exceptions noted, were identical.

Now therefore, it is this 10th day of June A. D. 1908, hereby stipulated by and between the undersigned, Counsel for the plaintiff and defendant, respectively, that the Bill of Exceptions, which is incorporated in the Transcript of Record in the said case, 125 numbered At Law 50111 which purports to be a Bill of Exceptions for the said case and this case be and the same is hereby considered a part of the Transcript of Record for the hearing in the Court of Appeals in this case which is Numbered At Law 49525, the same as if it had been inserted therein in toto, reinserting of the same being hereby waived. This however not to be construed as a waiver of plaintiff's right to move to expunge the bill of exceptions and for the affirmance of the judgment.

June 10/08.

WALTER C. CLEPHANE,
Attorney for the Plaintiff.
B. H. WARNER, JR.,
Attorney for the Defendant.

126 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 125, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed copies of which are made part of this transcript in causes numbered 49525 and 50111, At Law, wherein International Trust Company of Maryland, a Cor-

poration, is Plaintiff, and George E. Howard is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 12th day of June, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1914. George E. Howard, appellant, *vs.* International Trust Company of Maryland, a corporation; and No. 1915. George E. Howard, appellant, *vs.* International Trust Company of Maryland, a corporation. Court of Appeals, District of Columbia. Filed Jun- 15, 1908. Henry W. Hodges, clerk.

ENTERED FOR RECORD,
DISTRICT OF COLUMBIA
9122
OCT 12 1908

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1908.

No. 1914.

GEORGE E. HOWARD, APPELLANT,

vs.

INTERNATIONAL TRUST COMPANY OF MARY-
LAND, A CORPORATION, APPELLEE.

No. 1915.

GEORGE E. HOWARD, APPELLANT,

vs.

INTERNATIONAL TRUST COMPANY OF MARY-
LAND, A CORPORATION, APPELLEE.

**Brief for Appellee on Motion to Strike the
Bill of Exceptions From the Record and
Affirm the Judgment.**

WALTER C. CLEPHANE,
Attorney for Appellee.

GANS & HAMAN,
Of Counsel.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1908.

No. 1914.

GEORGE E. HOWARD, APPELLANT,

vs.

INTERNATIONAL TRUST COMPANY OF MARY-
LAND, A CORPORATION, APPELLEE.

No. 1915.

GEORGE E. HOWARD, APPELLANT,

vs.

INTERNATIONAL TRUST COMPANY OF MARY-
LAND, A CORPORATION, APPELLEE.

**Brief for Appellee on Motion to Strike the
Bill of Exceptions From the Record and
Affirm the Judgment.**

Statement of Facts.

A verdict in this case in favor of the plaintiff appellee was rendered on April 1, 1908 (Rec., p. 8.17), which was followed by a judgment in its favor on April 7th.^(R. 218) The January term of the trial court (which was the trial term) ended on the 6th day of April, the April term

commencing on the 7th of April. The bill of exceptions was not submitted by the appellant until ~~April~~^{May} 21 (Rec., p. 19), and was signed on the following day, ~~April~~^{May} 22 (Rec., p. 20).

The bill of exceptions was not submitted nor signed before the close of the trial term, as required by rule 54 of the Supreme Court of the District of Columbia, nor had the term been prolonged for the purpose of preparing it as allowed by that rule.

This is a motion to strike the bill of exceptions from the record and affirm the judgment.

Assignment of Error.

The trial court erred in signing the bill of exceptions which had not been presented before the close of the trial term.

ARGUMENT.

It has long been settled that a bill of exceptions signed after the term at which judgment was rendered without the consent of the parties to the cause or an order extending the term, can not be considered as part of the record.

U. S. *vs.* Jones, 149 U. S., 262.

Mich. Ins. Bank *vs.* Eldred, 143 U. S., 293.

Morse *vs.* Anderson, 150 U. S., 156.

It is of course competent for the court by the consent of the parties given *during the term*, to extend the term for the purpose of settling the bill.

Waldron *vs.* Waldron, 156 U. S., 361.

But if this is not done during the term the court becomes *functus officio* for that purpose and can not act thereafter.

Gordon *vs.* Randle, 189 U. S., 417.

Muller *vs.* Ehlers, 91 U. S., 249.

Jennings *vs.* P., B. & W. R. R. Co., 31 App. D. C., 173.

D. C.**vs.* Roth, 18 App. D. C., 547.

Talty *vs.* D. C., 20 App. D. C., 489.

Kelly *vs.* Moore, 22 App. D. C., 1.

Battelle *vs.* Denison, 21 D. C., 195.

Common law rule 54, of the Supreme Court of the District of Columbia, is very specific on this point. It reads as follows:

“The bill of exceptions *must be settled before the close of the term*, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in a case begun during a term but not concluded until after the expiration of the term, in which case the trial justice may extend the term in his discretion, in order to prepare a bill of exceptions.”

This very rule has been repeatedly construed by this court.

It will be observed that the *trial* was held at the January term, whereas the judgment was not entered until the April term. The bill of exceptions was not presented during the January term, but during the April term. The question is, therefore, distinctly presented whether “the term” referred to in section 2 of rule 54 is the trial term or the judgment term. This has been conclusively settled by this court in the case of *Brown vs. Bradley*, 6 App. D. C., 207, in which the identical

question now raised was presented. In that case the court, after an elaborate examination of the authorities and the reason for the rule, held that the term meant was the trial term. The following language was used in its opinion (p. 222):

“As we have intimated, the only question which we can regard as really in controversy in this cause, is whether the term at which a bill of exceptions must be settled is the term at which the trial was had, or the term at which the judgment was entered, if the entry of judgment was postponed by the postponement of a motion for a new trial to a subsequent term. To us it appears very plain that this question was decided correctly by the learned justice below. When rule 54, heretofore cited, requires the settlement of the bill of exceptions ‘*before the close of the term,*’ it necessarily means the term referred to in the preceding section of the same rule, the term in which the verdict was had, the term in which the trial was had, the term at which it should have been by the common law strictly and theoretically settled. The only term, therefore, in contemplation of the rule, at which it could be settled is the *trial term*.

“If there were any doubt whatever about this, the doubt would be removed by the provision in the rule; that for the purpose of settling a bill of exceptions, the term may be prolonged for a period not to exceed thirty days, while a motion for a new trial might be prolonged from term to term, almost without practical limit. But we have no doubt upon the subject. The inconvenience, the delay, and the uncertainty that would follow from the construction of the rule claimed by the petitioners would result in nothing but confusion in the administration of justice.

“If the petitioners have misapprehended the effect of the rule and have thereby lost their right of appeal, and their appeal is based upon substantial grounds, such result is greatly to be

regretted. But neither the rule itself nor the practice of the court below, so far as we are advised, was sufficiently doubtful to mislead the parties into the course which they pursued."

This is the rule which has been uniformly followed since the time of the decision last above cited.

Kelly *vs.* Moore, 22 App., D. C., 1.

Johnson-Wynne Co. *vs.* Wright, 28 App. D. C., 375.

Jennings *vs.* P., B. & W. R. R. Co., 31 App. D. C., 173.

The only answers given by the appellant in the trial court to the above enunciation of the law were two.

First. *That the court has a dispensing power over its own rules and may set them aside for the convenience of counsel.*

Second. *That common law rule 55 has been changed since the decision in Brown vs. Bradley, 6 App. D. C., 207, and that a reasonable interpretation of that rule would require that "the term" referred to in rule 54 be construed to be the judgment term.*

I.

Dispensing Power Over the Rules.

It has been frequently urged in this court that a justice of the lower court has a dispensing power over the rules of that court, and as frequently this contention has been held to be untenable, as will appear by the following extracts from opinions:

"The rule of court is the law of the court, as it is of the parties, and there is no dispensing power in the court, merely to meet what is supposed to be the pressing exigency of a particular case."

D. C. vs. Humphries, 11 App. D. C., 68, 78.

"These rules would be but of varying force and of little value either to the court or suitors, and, consequently, very imperfect regulations of the subject, if their limitations and provisions could be dispensed with upon any and all occasions when circumstances might show a possible hardship to the party who had failed to observe the requirements of the rules, whether such failure be occasioned by mistake, oversight, or otherwise. But these rules, so long as they remain unrescinded, can not be dispensed with by the court to meet the apparent hardship of any particular case, in the absence of fraud. They have the force of law, and are binding upon the court and upon the suitors and those who represent suitors."

D. C. *vs.* Roth, 18 App. D. C., 547, 550.

In a case similar to the one at bar, in which this court held that it would take judicial notice of rules 54 and 55 of the Supreme Court of the District of Columbia, the following language is used:

"Opposing counsel had the right to insist upon the strict observance of the requirements of the rule, and the trial justice had the right to refuse to settle the bill of exceptions over their objections."

Johnson-Wynne Co. *vs.* Wright, 28 App. D. C., 375, 380.

"The time prescribed by the rule must be given full force as a limitation of time for filing the transcript; that is the clear meaning and tenor of the rule."

Gros *vs.* Normont, 30 App. D. C., 574, 576.

As opposed to this doctrine, appellant's counsel cited to the court below the case of *U. S. vs. Breitling*, 20 How., 252. In that case there was no rule of court on the subject of signing bills of exceptions. A bill of exceptions had been presented to the court for signature during the term and before the court adjourned. It was

handed back by the court to the attorney presenting it, with the request that before signature by the court it should be submitted to opposing counsel. This was done, but before it was again presented to the court, the term had expired. The Supreme Court held that under these circumstances the bill, having been presented during the term, but not signed until afterwards, was properly signed. It did use *obiter* language indicating that it was within the power of the court to suspend its own rules or to except a particular case from its operation whenever the purposes of justice required it. But this has never been construed to mean that a single judge of a court can suspend the operation of a rule adopted by the court in general term. The cases decided by this honorable court on this subject were all of them decided long after the opinion in the case of *U. S. vs. Breitling, supra*, was handed down.

Regarding the case of *U. S. vs. Breitling, supra*, the Supreme Court of the United States has said in *Muller vs. Ehlers*, 91 U. S., 249, that "the particular grounds for the former ruling are not stated," and that the decision, which was based upon "the special circumstances of that case," "went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation." The Supreme Court of the United States held in the Muller case that the true rule is that the bill of exceptions should be signed *during the term*, and that there should be no exceptions to this rule "without an express order of the court *during the term*, or consent of the parties, save under very extraordinary circumstances." The court held that an order of the court allowing the bill of exceptions to be filed, made at the next term, was a nullity.

No reason is presented for extending indulgence in this case, which would not equally apply to every case where the rules have been violated.

In the case of *Sweet vs. Perkins*, 24 Fed., 777, both the cases last above cited were reviewed, and it was held that the bill of exceptions must be prepared and settled before the end of the term during which the cause was tried.

II.

The Change of Common Law Rule 55 Does Not Affect Rule 54.

When the decision in *Brown vs. Bradley*, 6 App. D. C., 207, was announced, common law rule 55 of the lower court provided that the bill of exceptions should be presented to the trial court within the thirty days after the *verdict*. The rule was changed on January 27, 1900, so as to provide that the bill of exceptions should be presented to the court within thirty-eight days after *judgment*. Although common law rule 54, which distinctly states that "*the bill of exceptions must be settled before the close of the term*," was deliberately left unchanged, the court well knowing the construction which had theretofore been placed upon that rule by this court, counsel for appellant now contends that rule 54 has been changed by implication.

Aside from the fact, as heretofore stated, that the rule has been uniformly construed since 1900, as it theretofore had been, this court has distinctly ruled in an opinion handed down on March 31, 1908, the day before the verdict in the case at bar, that rule 55 was not intended to affect the operation of rule 54.

"Rule 55 was not intended to affect the operation of rule 54. Its purpose is to secure the fair settlement of a delayed bill of exceptions by requiring the delivery of a copy of the proposed bill to the opposing party with notice of the time of its intended submission to the trial justice for its

settlement. *It operates within the term during which the trial was had, and within the term of its prolongation when made in accordance with the provision of section 2 of rule 54.'*

Jennings vs. P. B. & W. R. R. Co., 31 App. D. C., 173, 175.

Proper Practice in Such Cases.

Following the practice heretofore approved by this court in similar cases, appellee files this motion to strike the bill of exceptions from the record and affirm the judgment.

Moran vs. Wagner, 28 App. D. C., 166.

Johnson-Wynne Co. vs. Wright, 28 App. D. C., 375.

Jennings vs. P., B. & W. R. R. Co., 31 App. D. C., 173.

It is respectfully submitted that the law upon this subject has been so long settled and so frequently announced that the attempt to carry this case to this court by bill of exceptions must have been actuated only for the purpose of delaying execution.

Respectfully submitted.

WALTER C. CLEPHANE,
Attorney for Appellee.

GANS & HAMAN,
Of Counsel.